

**Committee:** Commons and Village Green Registration Panel

**Date:** 17 October 2012

**By:** Assistant Director, Legal and Democratic Services

**Title:** Application for land to the north of 14 and 31 Fern Road, St Leonards-on-Sea to be registered as a town or village green

**Purpose:** To consider the application

**Contact Officer:** Chris Wilkinson x35744

**Local Member:** Councillor Joy Waite

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**RECOMMENDATION: To reject the application made by Mr Keith Milchem pursuant to section 15 of the Commons Act 2006 to have land to the north of 14 and 31 Fern Road, St Leonards-on-Sea registered as a town or village green.**

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## 1. The Site

1.1 The land which is the subject of the application ("the Land") is shown outlined red on the map submitted with the application (annexed at Appendix 1). The Land comprises two broadly rectangular parcels of land separated by Fern Road, a public highway which runs north to south comprising a carriageway, footways on each side and a grass verge. The two parts of the Land lie to the east and west of Fern Road respectively. Both plots are open, undeveloped, grassed areas, which both slope relatively steeply from east to west. The part of the Land to the east of Fern Road ("the East Side") lies to the north of 14 Fern Road whilst the part of the Land to the west of Fern Road ("the West Side") lies to the north of 31 Fern Road. Photographs of the site are annexed at Appendix 2.

## 2. The Law

2.1 The law governing applications for registration of land as town or village green is set out in Section 15 Commons Act 2006 ('the Act'). A guide to the law is attached at Appendix 3, although each element of the statutory test is addressed in the Inspector's report. In short, the applicant must prove that the land has been used by a significant number of inhabitants of a locality or neighbourhood within a locality for lawful sports and pastimes 'as of right' for a period of twenty years. The Commons (Registration of Town and Village Green)(Interim Arrangements)(England) Regulations 2007 apply to all applications made under the 2006 Act and govern how village green applications should be processed by Local Authorities.

2.2 There is also persuasive precedent that the Committee cannot depart from a recommendation of an Inspector without good reason to do so (*R (Chaston) V Devon County Council* [2007] EWHC 1209 (Admin) )

## 3. The Application

3.1 The application is dated 21 January 2009 and was received by the Registration Authority on 23 January 2009.

3.2 The application was made under section 15(2) of the Commons Act 2006 as people continued to use the land at the time of the application.

3.3 A non-statutory public Inquiry was held over eight days, namely between 26-29 September 2011 and 23-26 January 2012 at Robsack Community Centre, St Leonards-on-Sea. The Inspector, appointed by the Registration Authority, heard submissions from the Applicant and the Objector. The Inspector then compiled a report which is attached at Appendix 4.

#### **4. Inspector's Recommendation**

4.1 The Inspector recommended that the Registration Authority should reject the application and not add the Land to the register of town and village greens on two grounds.

4.2 Firstly, that the Applicant has failed to establish that the Application Land has been used for lawful sports and pastimes to a sufficient extent and continuity throughout the relevant 20 year period to have created a town or village green.

4.3 Secondly, that the Applicant has failed to establish that the use of the Application Land has been by a significant number of the inhabitants of any qualifying locality or neighbourhood within a locality throughout the relevant 20 year period.

#### **5. Response from the Applicant and the Objector following the Inspector's Recommendation**

5.1 On 13 August 2012 both the Applicant and the Objector were sent a copy of the Inspector's report recommending that the application be dismissed. Both parties were invited to make comments on the report by 10 September 2012. No comments were received which went to the substantive points of the report.

#### **6. Conclusion and reason for Recommendation**

6.1 The Panel is recommended to reject the application for the reasons set out in the Inspector's report: that the Applicant has failed to establish that the Application Land has been used for lawful sports and pastimes to a sufficient extent and continuity throughout the relevant 20 year period to have created a town or village green and, that the Applicant has failed to establish that the use of the Application Land has been by a significant number of the inhabitants of any qualifying locality or neighbourhood within a locality throughout the relevant 20 year period.

6.2 The application has been subject to a non-statutory public Inquiry.

Appendix 1 – application plan

Appendix 2 – photographs of the application land

Appendix 3 – guide to the law

Appendix 4 – Inspector's report following a non-statutory public inquiry (12 August 2012)

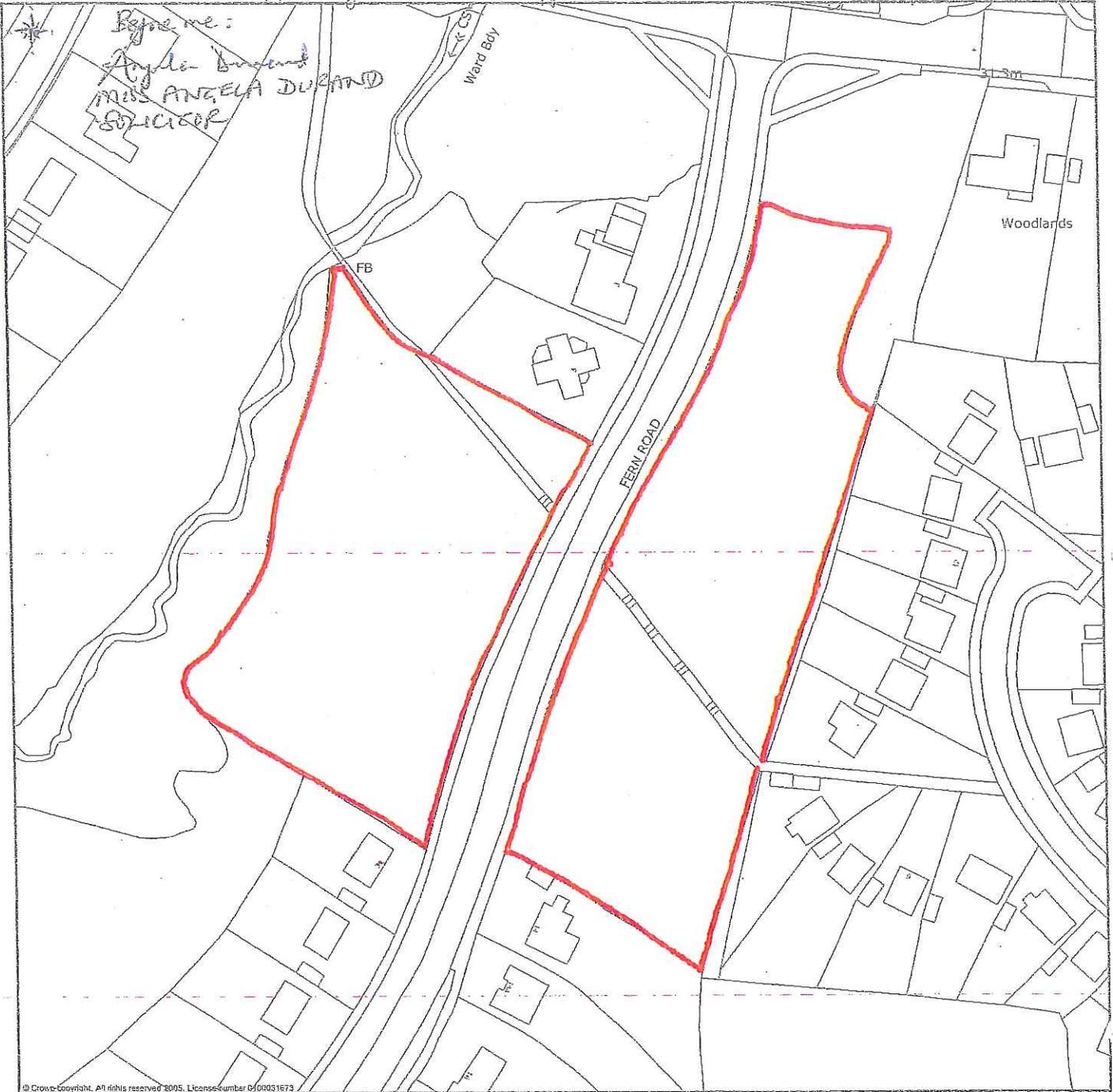
Philip Baker

Assistant Director

Legal and Democratic Services

**BACKGROUND DOCUMENTS:** Applicant's submissions at the non-statutory public inquiry, Objector's statement in response to application, Objectors submissions at the non-statutory public inquiry.

This is the map referred to in Paragraph 3 of the Statutory Declaration of Keith Milchem made this twenty first day of January 2009 and marked A as referred to in the Application dated 21<sup>st</sup> January 2009



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Produced by the Ordnance Survey National Geographic Database and incorporating surveyed revision available at the date of production.  
Reproduction in whole or in part is prohibited without the prior permission of Ordnance Survey.  
The representation of a road, track or path is no evidence of a right of way.  
The representation of features as lines is no evidence of a property boundary.

Scale 1:1250

# APPENDIX 1

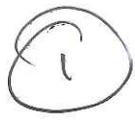
(A)

Map showing (highlighted red) the areas covered by the application for Town / Village Green status at OS reference TQ 790 102 approx.

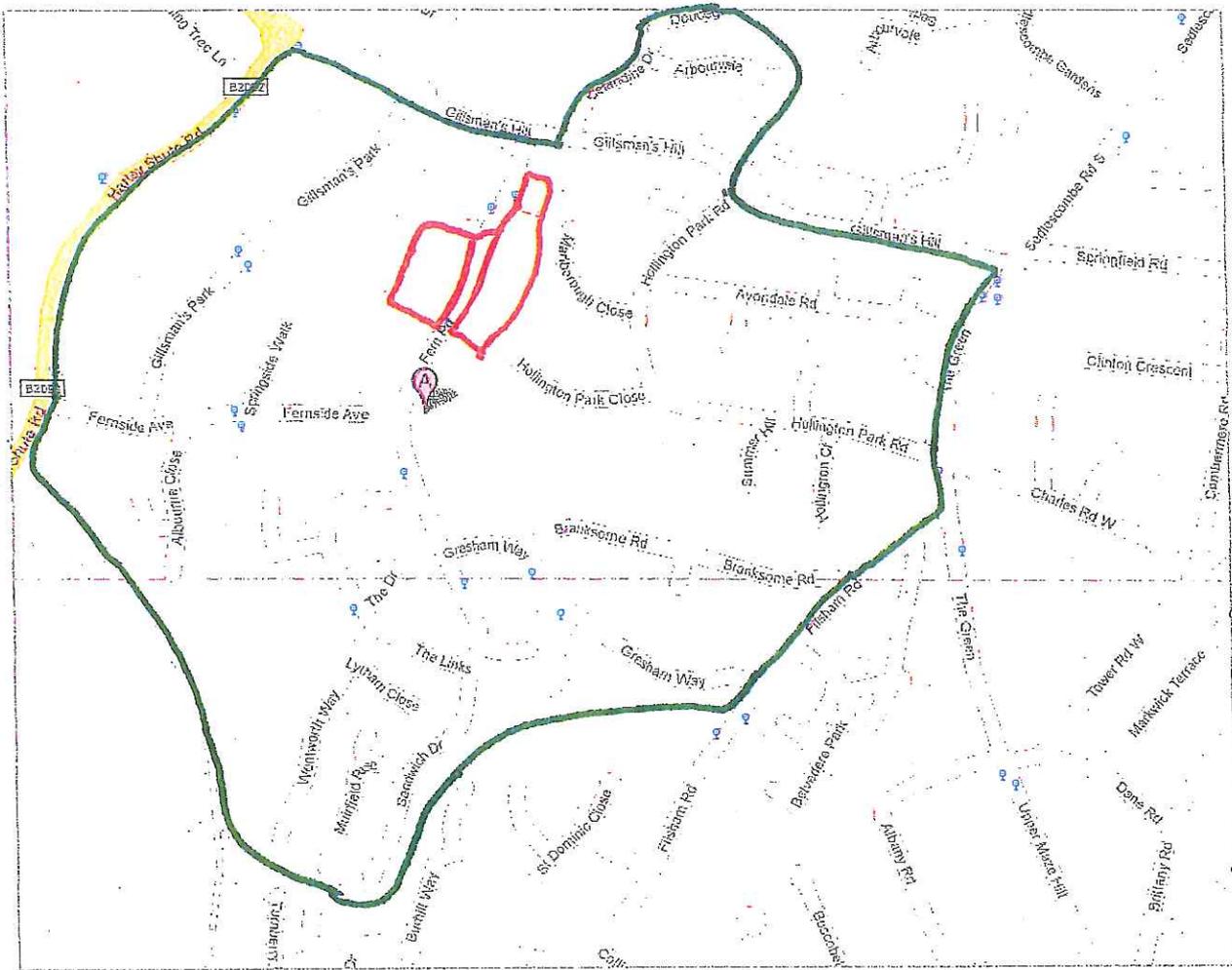
*Angela Dugand  
Solicitor*

Prepared by: Carol Milchem

1/13/2009



Address



(5)

Map showing the locality or neighbourhood to which the Town / Village Green application relates.

— Boundary of area

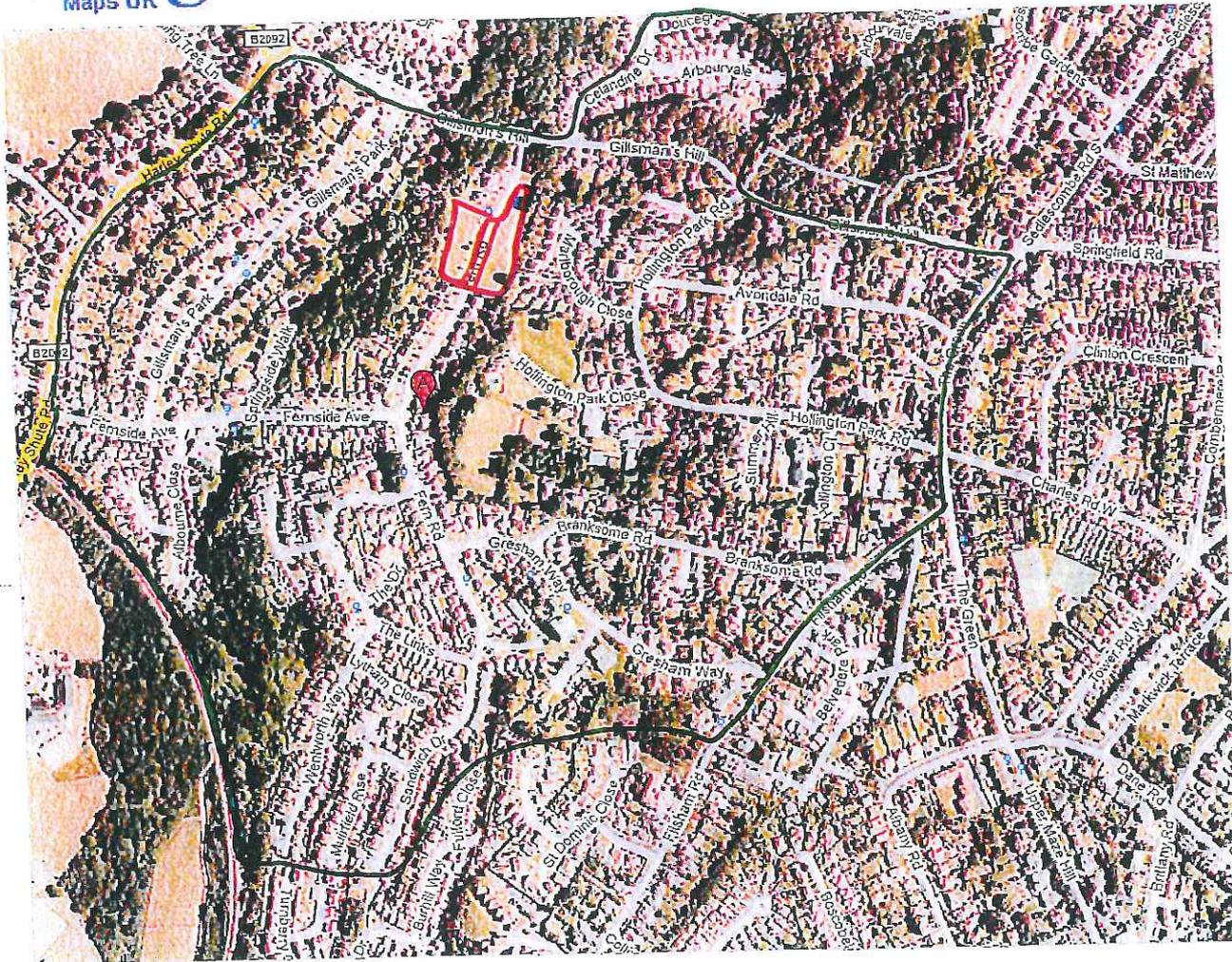
— Boundary of village green (approximate – see detailed 1:2500 map)

*Angela [Signature]*  
*Alminta*



Google  
Maps UK

Address



(c)

Satellite photograph showing the locality or neighbourhood to which the Town / Village Green application relates.

— Boundary of area

— Boundary of village green (approximate – see detailed 1:2500 map)

*Angela Smith  
Solicitor*





Address 34 Fern Road

Address is approximate



Appendix. 2



Address **34 Fern Road**

Address is approximate





Address **34 Fern Road**

Address is approximate





Address **33 Fern Road**

Address is approximate





Address **33 Fern Road**

Address is approximate





Address **32 Fern Road**

Address is approximate





Address **22 Fern Road**

Address is approximate





Address 13 Fern Road

Address is approximate





Address 4 Fern Road

Address is approximate





Address **8 Fern Road**

Address is approximate



## **Appendix 3 – A guide to Town and Village Green Law**

### **Commons Act 2006**

1. The Application was made pursuant to the Commons Act 2006. That Act requires each registration authority to maintain a register of town and village greens within its area. Section 15 provides for the registration of land as a town or village green where the relevant statutory criteria are established in relation to such land.
  
2. The Application seeks the registration of the Land by virtue of the operation of section 15(2) of the 2006 Act. Under that provision, land is to be registered as a town or village green where:-
  - “(a) a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and*
  - (b) they continue to do so at the time of the application.”*
  
3. Therefore, for the Application to succeed, it must be established that:-
  - (i) the Application Land comprises “land” within the meaning of the 2006 Act;
  - (ii) the Land has been used for lawful sports and pastimes;
  - (iii) such use has been for a period of not less than 20 years;
  - (iv) such use has been by a significant number of the inhabitants of a locality or of a neighbourhood within a locality;
  - (v) such use has been as of right; and
  - (vi) such use continued at the time of the Application.

### **Burden and Standard of Proof**

4. The burden of proving that the Land has become a village green rests with the Applicant for registration. The standard of proof is the balance of probabilities. That is the approach I have used.

5. Further, when considering whether or not the Applicant has discharged the evidential burden of proving that the Land has become a town or village green, it is important to have regard to the guidance given by Lord Bingham in *R. v Sunderland City Council ex parte Beresford*<sup>1</sup> where, at paragraph 2, he noted as follows:-

*“As Pill LJ. rightly pointed out in R v Suffolk County Council ex parte Steed (1996) 75 P&CR 102, 111 “it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green ...”. It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision makers must consider carefully whether the land in question has been used by inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years’ indulgence or more is met.”*

6. Hence, all the elements required to establish that land has become a town or village green must be properly and strictly proved by an applicant on a balance of probabilities.

### **Statutory Criteria**

7. Caselaw has provided helpful rulings and guidance on the various elements of the statutory criteria required to be established for land to be registered as a town or village green which I shall refer to below.

### **Land**

8. Any land that is registered as a village green must be clearly defined so that it is clear what area of land is subject to the rights that flow from village green registration.
9. However, it was stated by way of *obiter dictum* by the majority of the House of Lords in *Oxfordshire County Council v. Oxford City Council*<sup>2</sup> that there is no requirement that a piece of land must have any particular characteristics consistent with the concept of a village green in order to be registered.

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<sup>1</sup> [2004] 1 AC 889.

<sup>2</sup> [2006] 2 AC 674 per Lord Hoffmann at paragraphs 37 to 39.

## Lawful Sports and Pastimes

10. It was made clear in *R. v. Oxfordshire County Council ex parte Sunningwell Parish Council*<sup>3</sup> that “lawful sports and pastimes” is a composite expression and so it is sufficient for a use to be either a lawful sport or a lawful pastime. Moreover, it includes present day sports and pastimes and the activities can be informal in nature. Hence, it includes recreational walking, with or without dogs, and children’s play.

11. However, that element does not include walking of such a character as would give rise to a presumption of dedication as a public right of way. In *R. (Laing Homes Limited) v. Buckinghamshire County Council*<sup>4</sup>, Sullivan J. (as he then was) noted at paragraph 102 that:-

*“it is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way – to walk, with or without dogs, around the perimeter of his fields – and use which would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields.”*

12. A similar point was emphasised at paragraph 108 in relation to footpath rights and recreational rights, namely:-

*“from the landowner’s point of view it may be very important to distinguish between the two rights. He may be content that local inhabitants should cross his land along a defined route, around the edge of his fields, but would vigorously resist if it appeared to him that a right to roam across the whole of his fields was being asserted.”*

13. More recently, Lightman J. stated at first instance in *Oxfordshire County Council v. Oxford City Council*<sup>5</sup> at paragraph 102:-

*“Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes place, which includes the character of the land and the season of the year. Use of a track merely as an access to a potential green will ordinarily be referable only to exercise of a public right of way to the green. But walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential green may be recreational use of land as a green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. If the*

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<sup>3</sup> [2000] 1 AC 335 at 356F to 357E.

<sup>4</sup> [2003] EWHC 1578 (Admin).

<sup>5</sup> [2004] Ch. 253.

*position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a green)."*

14. He went on area paragraph 103 to state:-

*"The critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both. Where the track has two distinct access points and the track leads from one to the other and the users merely use the track to get from one of the points to the other or where there is a track to a cul-de-sac leading to, e g, an attractive view point, user confined to the track may readily be regarded as referable to user as a public highway alone. The situation is different if the users of the track, e g, fly kites or veer off the track and play, or meander leisurely over and enjoy the land on either side. Such user is more particularly referable to use as a green. In summary it is necessary to look at the user as a whole and decide adopting a common-sense approach to what (if any claim) it is referable and whether it is sufficiently substantial and long standing to give rise to such right or rights."*

15. The Court of Appeal and the House of Lords declined to rule on the issue since it was so much a matter of fact in applying the statutory test. However, neither the Court of Appeal nor the House of Lords expressed any disagreement with the above views advanced by Lightman J.

### **Continuity and Sufficiency of Use over 20 Year Period**

16. The qualifying use for lawful sports and pastimes must be continuous throughout the relevant 20 year period: *Hollins v. Verney*.<sup>6</sup>

17. Further, the use has to be of such a nature and frequency as to show the landowner that a right is being asserted and it must be more than sporadic intrusion onto the land. It must give the landowner the appearance that rights of a continuous nature are being asserted. The fundamental issue is to assess how the matters would have appeared to the landowner: *R. (on the application of Lewis) v. Redcar and Cleveland Borough Council*.<sup>7</sup>

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<sup>6</sup> (1884) 13 QBD 304.

<sup>7</sup> [2010] UKSC 11 at paragraph 36.

## Locality or Neighbourhood within a Locality

18. A “locality” must be a division of the County known to the law, such as a borough, parish or manor: *MoD v Wiltshire CC*;<sup>8</sup> *R. (on the application of Cheltenham Builders Limited) v. South Gloucestershire DC*;<sup>9</sup> and *R. (Laing Homes Limited) v. Buckinghamshire CC*.<sup>10</sup> A locality cannot be created simply by drawing a line on a plan: *Cheltenham Builders case*.<sup>11</sup>
19. In contrast, a “neighbourhood” need not be a recognised administrative unit. Lord Hoffmann pointed out in *Oxfordshire County Council v. Oxford City Council*<sup>12</sup> that the statutory criteria of “any neighbourhood within a locality” is “obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries”. Hence, a housing estate can be a neighbourhood: *R. (McAlpine) v. Staffordshire County Council*.<sup>13</sup> Nonetheless, a neighbourhood cannot be any area drawn on a map. Instead, it must be an area which has a sufficient degree of cohesiveness: *Cheltenham Builders case*.<sup>14</sup>
20. Further clarity was provided on that element recently by HHJ Waksman QC in *R. (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v. Oxfordshire County Council*<sup>15</sup> who stated:-

“While Lord Hoffmann said that the expression was drafted with “deliberate imprecision”, that was to be contrasted with the locality whose boundaries had to be “legally significant”. See paragraph 27 of his judgment in *Oxfordshire (supra)*. He was not there saying that a neighbourhood need have no boundaries at all. The factors to be considered when determining whether a purported neighbourhood qualifies are undoubtedly looser and more varied than those relating to locality... but, as Sullivan J stated in *R (Cheltenham Builders) Ltd v South Gloucestershire Council [2004] JPL 975 at paragraph 85*, a neighbourhood must have a sufficient degree of (pre-existing) cohesiveness. To qualify therefore, it must be capable of meaningful description in some way. This is now emphasised by the fact that under the *Commons Registration (England) Regulations 2008* the entry on the register of a new TVG will specify the locality or neighbourhood referred to in the application.”

<sup>8</sup> [1995] 4 All ER 931 at page 937b-e.

<sup>9</sup> [2003] EWHC 2803 (Admin) at paragraphs 72 to 84.

<sup>10</sup> [2003] EWHC 1578 (Admin) at paragraph 133.

<sup>11</sup> At paragraphs 41 to 48.

<sup>12</sup> [2006] 2 AC 674 at paragraph 27.

<sup>13</sup> [2002] EWHC 76 (Admin).

<sup>14</sup> At paragraph 85.

<sup>15</sup> [2010] EWHC 530 (Admin) at paragraph 79.

### Significant Number

21. “*Significant*” does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers: *R. (McAlpine) v. Staffordshire County Council*.<sup>16</sup>

### As of Right

22. Use of land “*as of right*” is a use without force, without secrecy and without permission, namely *nec vi nec clam nec precario*. It was made clear in *R. v. Oxfordshire County Council ex parte Sunningwell Parish Council*<sup>17</sup> that the issue does not turn on the subjective intention, knowledge or belief of users of the land.

23. “Force” does not merely refer to physical force. User is *vi* and so not “*as of right*” if it involves climbing or breaking down fences or gates or if it is under protest from the landowner: *Newnham v. Willison*.<sup>18</sup> Further, Lord Rodger in *Lewis v. Redcar* stated that “*If the use continues despite the neighbour’s protests and attempts to interrupt it, it is treated as being vi...user is only peaceable (nec vi) if it is neither violent nor contentious*”.<sup>19</sup>

24. “Permission” can be expressly given or be implied from the landowner’s conduct, but it cannot be implied from the mere inaction or acts of encouragement of the landowner: *R. v. Sunderland City Council ex parte Beresford*.<sup>20</sup>

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<sup>16</sup> [2002] EWHC 76 (Admin) at paragraph 71.

<sup>17</sup> [2000] 1 AC 335.

<sup>18</sup> (1988) 56 P. & C.R. 8.

<sup>19</sup> At paragraphs 88-90.

<sup>20</sup> [2004] 1 AC 889.

**Appendix 4**

**IN THE MATTER OF AN APPLICATION TO REGISTER LAND TO THE  
NORTH OF 14 AND 31 FERN ROAD, ST. LEONARDS ON SEA, EAST  
SUSSEX AS A TOWN OR VILLAGE GREEN**

**REPORT  
of Miss Ruth Stockley  
12 August 2012**

**East Sussex County Council  
County Hall  
St Anne's Crescent  
Lewes  
East Sussex  
BN7 1UE  
Ref: CR0/10**

**Application No: 1354**

**IN THE MATTER OF AN APPLICATION TO REGISTER LAND TO THE  
NORTH OF 14 AND 31 FERN ROAD, ST. LEONARDS ON SEA, EAST  
SUSSEX AS A TOWN OR VILLAGE GREEN**

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**REPORT**

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**1. INTRODUCTION**

1.1 This Report relates to an Application (“the Application”) made under section 15(1) of the Commons Act 2006 (“the 2006 Act”) to register land to the north of 14 and 31 Fern Road, St. Leonards On Sea, East Sussex (“the Land”) as a town or village green. Under the 2006 Act, East Sussex County Council, as the Registration Authority, is required to register land as a town or village green where the relevant statutory requirements have been met. The Registration Authority instructed me to hold a non-statutory public inquiry into the Application, to consider all the evidence and then to prepare a Report containing my findings and recommendations for consideration by the Authority.

1.2 I held such an Inquiry over 8 days, namely between 26 and 29 September 2011 and between 23 and 26 January 2012 inclusive. I also undertook an accompanied site visit on 28 September 2011, together with unaccompanied visits to the site, around and within the neighbourhood and around the surrounding area, including Ponds Wood, Celandine Meadow and South Saxons Playing Fields, on 27 September 2011 and on 26 January 2012.

1.3 Prior to the Inquiry, I was invited to make directions as to the exchange of evidence and of other documents. Those documents were duly provided to me by both Parties which significantly assisted my preparation for the Inquiry. The Applicant produced a bundle of documents containing his witness statements, statutory declarations, evidence questionnaires, letters in support and other documentary evidence in support of the Application and upon which he wished to rely, which I shall refer to in this Report as “AB”. The Objectors produced a bundle of documents in four separate files containing their statutory declarations, witness statements and other documentary evidence in support of their Objection and upon which they wished to rely. I shall refer to that bundle as “OB\*” where \* is the number of the relevant file. In addition, each Party provided a skeleton argument setting out an outline of their case. I have read all the documents contained in the bundles and each of the skeleton arguments and taken their contents into account in this Report. In addition, during the course of the Inquiry, the Parties produced further documents marked as “AP” and “OB” documents respectively which are referred to in this Report.

1.4 I emphasise at the outset that this Report can only be a set of recommendations to the Registration Authority as I have no power to determine the Application nor any substantive matters relating thereto. Therefore, provided it acted lawfully, the

Registration Authority would be free to accept or reject any of my recommendations contained in this Report.

## **2. THE APPLICATION**

2.1 The Application was made by Keith Lawrence Milchem of 14, Fern Road, St Leonards on Sea, East Sussex (“the Applicant”) and is dated 21 January 2009.<sup>1</sup> It was received by the Registration Authority on 23 January 2009. Part 5 of the Application Form states that the Land sought to be registered has no specific name except “*the open land at the end of Fern Road*”, and its location is “*Either side to the North of nos 31 and 14 Fern Road, St Leonards on Sea, East Sussex TN38 0UH at approximately OS reference TQ 790 102m Marked in Red on the map (A)*”. A map, marked “(A)”, was submitted with the Application which shows the Land subject to the Application outlined in red. In part 6 of the Application Form, the relevant “locality or neighbourhood within a locality” is identified as “*parts of the Maze Hill and Wishing Tree areas of St. Leonards on Sea*”, as outlined in green on the attached locality map marked “(B)” and on the satellite photograph marked “(C)”.

2.2 The Application is made on the basis that section 15(2) of the 2006 Act applies, which provision contains the relevant qualifying criteria. The justification for the registration of the Land is set out in Part 7 of the Form. The Application is verified by a statutory declaration in support made on 21 January 2009. As to supporting documentation, reference is made in Part 10 to the Supporting Statement together with signed questionnaires from local residents and users of the Land, all of which were submitted with the Application.

2.3 The Application was duly advertised by the Registration Authority as a result of which an objection was received dated March 2009 on behalf of three of the owners of parts of the Land, namely Streamside Properties Limited, Mr O [REDACTED] A [REDACTED] and Witrose Developments Limited (“the Objection”).<sup>2</sup> On 14 May 2009, the Applicant responded to the Objection Statement in a Response.<sup>3</sup> A further Response Statement dated 27 July 2009 was submitted by the Objectors,<sup>4</sup> to which the Applicant responded by means of a Response dated 29 November 2009.<sup>5</sup>

2.4 I have been provided with copies of all the above documents in support of and objecting to the Application which I have read and the contents of which I have taken into account in this Report.

2.5 Having received such representations, the Registration Authority determined to arrange a non-statutory inquiry prior to determining the Application which I duly held.

2.6 At the Inquiry, the Applicant was represented by Counsel, Mr Ned Westaway, and the Objectors were represented by Counsel, Mr Jonathan Clay. Any third parties who were not being called as witnesses by the Applicant or the Objectors and wished to make any representations were invited to speak, and one additional person did so.

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<sup>1</sup> The Application is contained in AB at section A.

<sup>2</sup> The Objection Statement is at OB1 pages 4-40.

<sup>3</sup> At AB pages A1-A9.

<sup>4</sup> At OB2 pages 276-317.

<sup>5</sup> At AB page A11.

### **3. THE APPLICATION LAND**

3.1 The Application Land is identified on Map (A) submitted with the Application on which it is outlined in red.

3.2 It is located within an attractive residential area. It comprises two broadly rectangular parcels of land separated by Fern Road, a public highway which runs north to south comprising a carriageway, footways on each side and a grass verge. The two parts of the Land lie to the east and west of Fern Road respectively. Both plots are open, undeveloped, grassed areas, which both slope relatively steeply from east to west. The part of the Land to the east of Fern Road (“the East Side”) lies to the north of 14 Fern Road whilst the part of the Land to the west of Fern Road (“the West Side”) lies to the north of 31 Fern Road.

3.3 There are definitive public footpaths running across both parts of the Land, namely Hastings 64 on the East Side and Hastings 63 on the West Side, which together link Marlborough Close in the east to the bridge over Hollington Stream in the west, where they then connect to an unmade footpath which provides public access to Ponds Woods and the land formerly known as Celandine Meadow to the north. They are both hard surfaced, and the footpath on the East Side has a series of concrete steps with hand rails. There are brambles along the eastern and southern boundaries of the East Side and along the western boundary of the West Side. The Land is currently fenced off save for the footpaths. There are no signs or any other furniture on the Land.

3.4 The current ownership of the Land is split into different plots. The East Side is owned by Streamside Properties Limited, Omar Al Hasso and Hastings Borough Council whilst the West Side is owned by Witrose Developments Limited and Hastings Borough Council as shown on the ownership map.<sup>6</sup>

### **4. THE EVIDENCE**

4.1 Turning to the evidence, I record at the outset that every witness from both Parties presented their evidence in an open, straightforward and helpful way. Further, I have no reason to doubt any of the evidence given by any witness save as indicated below, and I regard each and every witness as having given credible evidence to the best of their individual recollections.

4.2 The evidence was not taken on oath.

4.3 The following is not an exhaustive summary of the evidence given by every witness to the Inquiry. However, it purports to set out the flavour and main points of each witness’s oral evidence. I assume that copies of all the written evidence will be made available to those members of the Registration Authority determining the Application and so I shall not rehearse their contents herein. I shall consider the evidence in the general order in which each witness was called at the Inquiry for each Party.

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<sup>6</sup> OB1 page 42.

## CASE FOR THE APPLICANT

### Oral Evidence in Support of the Application

4.4 Mr Keith Milchem<sup>7</sup> is the Applicant who has lived at [REDACTED] Fern Road since [REDACTED] with his Wife and family. At that time, he had three Children aged [REDACTED], [REDACTED] and [REDACTED]. His house adjoins the East Side of the Land at its southern boundary. He had free and unrestricted use of the Land for over [REDACTED] years until May 2009 when a fence was erected surrounding the Land together with private property notices. He was never stopped from going onto the Land, even when contractors were working there drilling boreholes and digging test pits in 2006 and 2007 which did not affect the ability of people to use the Land. Indeed, he conversed with one of the contractors on the West Side. No permissions were granted to use the Land, no signs were erected stopping use of the Land and no barriers were erected impeding access to the Land.

4.5 He used the Land for a variety of activities until it was fenced in 2009, and he has seen many others using the Land. When his Children were young, the Land became an extension of his garden where his Children could play safely together with their friends and sometimes with him and his wife. They played games on the Land, ball games, cricket, flew kites and had picnics. They tobogganed on the Land in winter. They used it more often during the summer months. Sometimes they would use it three times per week; at other times they would use it once every two or three weeks. They mainly used the East Side. His own use of the Land became much less once his Children had grown up. He is not a dog owner. At one period, he used to hit golf balls on the Land. He has also run across it and walked across it. He used both the East Side and the West Side, but not the northern part of the East Side as it was not as closely mown. On occasions, he walked diagonally across the East Side of the Land from his house through to Marlborough Close. That diagonal route is apparent on the ground, and it has been used by many others and not merely himself. It was the short cut route of choice for people going from Marlborough Close to the shops. That southern part of the East Side was mown regularly, and the ground was fairly firm and not marshy. During the autumn, he picked blackberries from the Land, usually from the East Side but occasionally from the West Side. He had walked across the Land during the period of the Objectors' photographic survey in 2009, either up towards Marlborough Close or down onto the West Side. He has seen many others using the Land since [REDACTED] until the Land was fenced for activities such as kite flying, playing ball games, running across the Land, sitting on the Land, walking with and without dogs and blackberry picking. Dog walkers tended to follow a route round the periphery of the northern part of the East Side, and then either follow a path or go off the path on the southern part. Dog walkers tended to use the West Side more for throwing balls and frisbees. When he was a teacher until [REDACTED], he spent much time at home during the school holidays, and he subsequently worked from home in the side extension from which he had views over the Land. There was a land slippage on the northern part of the East Side in the past that was rectified in part by Hastings Borough Council and that area is safe. However, he tended to play with his Children on the southern part of the East Side. He confirmed that he had objected to previous planning applications made in relation to the Land in order to enable its recreational use to continue.

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<sup>7</sup> His written evidence is at AB section W tab 18.

4.6 The times when there were most people on the Land at any one time were when it snowed. He produced a document obtained from Hastings Borough Council showing the extent of significant snowfall events within that district from 1989 onwards,<sup>8</sup> and he pointed out that tobogganing took place on the Land whenever there was a sufficient amount of snowfall to enable such an activity to take place. In his view, there were probably around nine occasions identified on that document and within the relevant 20 year period where the snow would be deep enough for tobogganing to take place, some of which spanned a number of days. He also produced two photographs of the Land in snowy conditions [REDACTED] taken in 1991 from which people can be seen using the Land on both the East Side and the West Side, although he acknowledged that some were on or close to the footpath.<sup>9</sup> He was unable to identify where those people lived. Another photograph of the Land when it had snowed taken in February 2009 when the schools were closed showed more people on the Land.<sup>10</sup> The average number would be somewhere in between those shown on the three photographs. A further photograph he had taken showed his [REDACTED] and [REDACTED] from [REDACTED] playing on the East Side during 1990. No one else was shown in that photograph.

4.7 He acknowledged that the Objectors had taken over 650 photographs in their survey of the Land after the Application had been made which were taken over many different days, including weekends. However, he noted that the parts of the Land shown in each of the photographs were governed by the photographer and where he pointed the camera. Moreover, some were taken from a car, and it would only take between approximately 11 and 14 seconds to drive past the Land. Nonetheless, he acknowledged that there was nothing to indicate that those photographs were not representative of the use of the Land. As to the suggested lack of photographic evidence in support of the Application save in snowy conditions and his own photographs, he pointed out that the use people made of the Land was part of their everyday practices and so there would be no particular reason for users to have taken photographs. In relation to the [REDACTED] photographs taken in 2007 and 2008,<sup>11</sup> he agreed that they all represented the appearance and condition of the Land at those times when the photographs were taken which were during the relevant 20 year period. A darker green line was evident leading diagonally across the southern part of the East Side from Marlborough Close to his garage. The Land was shown mown on that southern part but not on the northern part, which was the result of a deliberate mowing policy to avoid the northern part of the East Side due to its habitat status. Similarly, the photographs contained in the Geotechnical Report dated March 2006 were representative of the condition and appearance of the Land at that time.<sup>12</sup>

4.8 Within the first 15 years of the qualifying period, there was another area of open land to the north of Celandine Road which was developed around 5 years ago. It was less easily accessible to some from the neighbourhood and more easily accessible to others. There was open access to that land and it was safe for use, but there was high vegetation on it. He disagreed that it was more attractive for use than the Application Land, although he acknowledged it was larger, flatter and safer.

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<sup>8</sup> AP1.

<sup>9</sup> Appendix 1 to his witness statement.

<sup>10</sup> Appendix 2a to his witness statement.

<sup>11</sup> At OB3 pages 768 to 782.

<sup>12</sup> At OB2 page 501 onwards.

4.9 As to the making of the Application, he became aware of the registration of land as a town or village green in December 2008, and he was responsible for co-ordinating the Application. He, Mr S [REDACTED] and Mr C [REDACTED] drew up a pro-forma questionnaire having obtained information from the Open Spaces Society, and then visited houses in the neighbourhood to ascertain the level of usage of the Land, requesting people to complete the questionnaire if they had used the Land. Approximately 20% to 25% of those visited did not use the Land, which often depended upon their distance from the Land. If no-one was in, they did not return. As they were short of time, they stopped making visits once they were of the view that they had a sufficient number of responses to support the making of the Application and so they did not visit every street in the neighbourhood. He accepted that the questionnaires did not enable individual users to indicate the period during which the claimed activities took place on the Land, but they were invited to write letters of support. No coercion whatsoever was placed upon anyone to complete the questionnaires and he did not indicate to anyone what they should write on the form. They were completed honestly by the individuals in question. He did not seek to persuade anyone to support the Application; he merely sought to ascertain they were able to support it. There was no meeting arranged for those who had signed questionnaires. They also had assistance from a solicitor who lives in Fern Road in preparing the sworn statutory declarations.

4.10 The neighbourhood for the purposes of the Application was identified as on Plan (B) submitted with the Application by the three of them collectively. He confirmed that the Application was not relying upon a “locality” but, rather, a neighbourhood. The identified neighbourhood comprises a residential area mostly of similar type houses built in the 1960’s to 1980’s on land sold by the Borough Council, but also with some older properties in some of the roads. It is bounded by busy roads and a railway track as shown on the OS Map produced.<sup>13</sup> The area of Celandine Drive was also included as residents from that area also used the Land. The neighbourhood includes three parishes and three electoral wards. He regarded it as a cohesive area. It has its own centre around the shops in Fernside Avenue; the Wishing Tree Residents Association covers all the neighbourhood plus a wider area; there have been Neighbourhood Watch schemes in various parts of the neighbourhood; there is a coffee club in the Fern Road / Gillsman’s Park area, and the residents of Marlborough Close organise social get-togethers at each other’s houses. In addition, dog walkers meet and socialise on the Land and elsewhere in the area. There have not been any organised events upon the Land itself, but there is a cohesiveness in the area with neighbours helping each other in a variety of supportive ways. The neighbourhood does not contain any state school, although there was previously a private school there, nor does it have any church, hall, public house, cinema, leisure facilities nor a doctor’s surgery. Nonetheless, there is a parade of shops within the neighbourhood which are also used by people living in the wider area. There is a community notice board inside one of the shops. The neighbourhood does not have a recognised name in any published document. He acknowledged that there were around 875 to 900 households within the claimed neighbourhood, and that the majority of residents of the neighbourhood did not complete a questionnaire. However, that was due to them not being visited. 170 questionnaires were completed, so approximately 20% of the

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<sup>13</sup> AP3.

neighbourhood completed a questionnaire. They were advised to aim for around 15 or 20 witnesses to give evidence at the inquiry to demonstrate a representative sample of the use of the Land across a reasonable spread of the neighbourhood. He acknowledged that the use of the Land as shown by the questionnaires was focussed on the area closest to the Land. However, that could have been a reflection of his survey which focused on that area.

4.11 Mr ██████ S█████<sup>14</sup> has lived at ██████ Douce Grove since ██████ together with his Wife and two Children. The Land is approximately a five minute walk from his house, located in the northern part of the neighbourhood. From ██████ until ██████ when he had a border collie, the Land was part of one of his routine dog walks. It was a safe and open area of grassland which the dog could run on and was not too muddy underfoot. He then used the Land at least twice a week, usually in the evenings. His usual walk involved letting his dog off the lead on the East Side, walking up the northern edge of that area, and then either retracing his steps or, if the grass was not too long, walking diagonally across the Land back to the footway. If the weather was bad or he was in a hurry, he would remain on the footway and encourage his dog to run on the Land by herself. The majority of his dog walking was on the East Side, but he sometimes used the West Side at weekends. Other dog walkers used the West Side because it was less busy. There was a small local shop at Fernside known as “Andys” which also incorporated the local post office which he often walked to with his dog across the West Side between ██████ and ██████. His dog would have a run on the grassy area. Andys went about ten years ago and has been replaced by Tesco. During the occasional snowy periods, his Children and their friends went tobogganing on the East Side. His Children now live outside the neighbourhood. He only used the Land “*very infrequently*” post ██████ when his children were older and he no longer had a dog. There were never any signs restricting access onto the Land and he always had free and open access to it.

4.12 The area of open land at Celandine Drive is larger than the Application Land and slightly flatter, but then it went into woodland which was not safe. Moreover, lorries were often left there and skips which made it noisy and unpleasant. It was not always the best place to be with a dog, and it was not well mown. It could get muddy during the winter months, and there were no street lights there.

4.13 Mrs ██████ G█████<sup>15</sup> has lived at ██████ Gillsman’s Park since ██████. She used the Land for many years for dog walking until 2009. During the 1980’s and the early 1990’s, she used the Land at least three times per week, often in darkness during the winter. It was a safe place to walk and was well lit. From ██████, she used the Land more as she had acquired a puppy which needed much more exercise than her older dog. People also used the field at the end of Celandine Drive to walk their dogs. Those with “friendly” dogs preferred Celandine Meadow for dog walking, and it was also away from traffic. However, that was enclosed in preparation for housing development around 2005. From then onwards, she used the Application Land more frequently, probably several times per week more. The Application Land “*became more precious*” once Celandine Meadow was no longer available. Her use of the Land varied between summer and winter, and she used it much more during the winter as it

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<sup>14</sup> His written evidence is at AB section W tab 1.

<sup>15</sup> Her written evidence is at AB section W tab 10.

was still easy to walk on the Land in contrast to other areas. When she walked her dogs on the Land, it varied as to whether she would see other dog owners on the Land. She mainly walked on the West Side because it was safer. She was aware that the East Side had been unstable in the past. She walked along the boundaries of the West Side along the edge of the brambles where there were interesting smells for her dogs which she let off the lead. After her dogs died in early [REDACTED], she continued to go for a morning walk every day to keep herself fit, and she usually went onto the Land until May 2009 when the fences were erected.

4.14 Mr [REDACTED] D [REDACTED]<sup>16</sup> has lived at [REDACTED] Gillsman's Park since August [REDACTED] with his Wife and family. They have periodically used the West Side of the Land. His use of the Land was initially when his Children were growing up. They did not play on the Land regularly, but when it snowed, it was an ideal place for them to play. In addition, they used it as a meeting place to meet their friends and walked across it now and again. From time to time, he also used the Land for walking across as part of a longer route about three times per week to keep fit. He usually walked on the grass. He acknowledged that his use of the Land until November 2007 was sporadic. However, in [REDACTED], he acquired a puppy which he and his Wife exercise twice a day. He had not previously owned a dog. He takes him for a walk every evening anytime between 5.30pm and 8.00pm, which he was doing at the time the photographic survey was carried out by the Objectors. Their walking route included cutting across both the East Side and the West Side towards the bridge until the fences were erected in May 2009. He described the route of his shorter walks as being broadly the same as that taken by Mrs G [REDACTED]. His longer walks at weekends involved walking down the steps on the East Side from Marlborough Close and then across the West Side to the bridge, broadly following the route of the footpath. He could not recall the extent he met other dog walkers on the Land.

4.15 Mrs [REDACTED] W [REDACTED]<sup>17</sup> has lived at [REDACTED] Marlborough Close since May [REDACTED] with her Husband and [REDACTED] Children. Her house backs on to the northern part of the East Side and there has been a gate in their fence and a gap in the hedgerow beyond allowing them their own private access to the Land from their property since before 1989. Her views of the Land from the house are obscured by vegetation. Until May 2009 when the Land was fenced off, she and her family used the East Side for recreational purposes, as did many other local people. The East Side was well maintained by Hastings Borough Council, which regularly mowed the grass to the south of the footpath but allowed the northern part to develop as meadowland with a variety of wild flowers growing. The grass was allowed to grow longer there and was only mown two or three times a year, namely early in the season and then it was left until late season before it was mown again. People walked along the edge of the brambles in that area, as she did. She always understood the Land to be an amenity area which people could use.

4.16 Between [REDACTED] and [REDACTED], her Children used the southern, mown part of the East Side quite regularly with other children in the area as their own garden was unsafe and difficult to play on due to its steep slope. They played games, played with frisbees, flew kites, picnicked and sledged on that part of the Land. [REDACTED] also used

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<sup>16</sup> His written evidence is at AB section W tab 4.

<sup>17</sup> Her written evidence is at AB section W tab 14.

it for cricket practice until [REDACTED]. The Land was not too steep for that purpose. It was not particularly uneven at that time either, namely before the slippage. Her Children also sledged on the West Side. They are now adults, but she has seen other children playing on the Land. In addition, all the Land was used daily by local dog walkers. She walked on the Land two or three times a week during the summer months when it was not wet or muddy throughout the relevant 20 year period, particularly on the northern part of the East Side because of the variety of wild flowers, including orchids, that grew there. She walked along the edge of the brambles, and then across the grass down to Fern Road in the vicinity of the green telephone box. She also picked blackberries from both parts of the Land during the season. The footpath across the Land is very well used, and is used frequently by school children walking to and from school.

4.17 Mr [REDACTED] W [REDACTED]<sup>18</sup> has lived at [REDACTED] Albourne Close since [REDACTED] with his Wife, and their [REDACTED] were born in [REDACTED] and [REDACTED]. They have always owned a dog since they lived there, and they regularly walked their dogs across the Land, particularly across the West Side, approximately five times per week. When they reached [REDACTED] Fern Road, they tended to take the shortest route across the Land and walked across it to the bridge and on to Gillsman's Park. There have never been any notices or barriers restricting access to the Land and he has always enjoyed unrestricted access to it until May 2009. He continues to do the same walk with his dogs most days save that he no longer cuts across the Land.

4.18 Mr [REDACTED] J [REDACTED]<sup>19</sup> has lived at [REDACTED] The Links since [REDACTED]. He has always had a dog, and he exercised it on the Land three times every day since that time, namely at 5.30am, around 6.00pm and again around 10.30pm. He mainly used the West Side, but he used the East Side occasionally when the pathways in the wood were muddy during the winter. He walked his dog down to the brambles away from the road and let him off the lead. In his statement, he noted that he walked across the grass "*skirting the brambles all the way down*" from 31 Fern Road to the bridge, but in his oral evidence he pointed out that he would have covered every part of the West Side over the 30 years he has used it. He acknowledged that there was nothing in his written statement stating that he had walked over the rest of the West Side. The route he described along the edge of the brambles was the route he saw other dog walkers specifically using. He regularly met other dog walkers on the Land, particularly during his second walk of the day. His [REDACTED] Children, who are now aged [REDACTED] and [REDACTED], also used the Land until around 2007. They went blackberry picking on both parts of the Land, and tobogganing when it snowed.

4.19 Mr [REDACTED] B [REDACTED]<sup>20</sup> has lived at [REDACTED] Georgian Walk since [REDACTED] together with his Wife and Children. Prior to [REDACTED], he lived outside the neighbourhood. Since [REDACTED], he has used the Land to walk his dogs two or three times a week and at weekends, and to play with his Children. He has always had a dog. The route he generally took with his dogs was diagonally across the West Side from the location of the bridge in the north western corner to 31 Fern Road while his dogs roamed freely. Others took that route across the West Side. He would see others using the Land approximately once a week. He has also been blackberry picking on the West Side along the brambles. During the

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<sup>18</sup> His written evidence is at AB section W tab 3.

<sup>19</sup> His written evidence is at AB section W tab 8.

<sup>20</sup> His written evidence is at AB section W tab 15.

snow, his Children used all of the Land on both sides. His use of the East Side for dog walking was more limited, but he would use it two or three times per week during the summer. He was using the Land during the period when the photographic survey was taken. He has always enjoyed unrestricted access to the Land and has never seen any notices or barriers restricting access.

4.20 Mr [REDACTED] R [REDACTED]<sup>21</sup> has lived at [REDACTED] Fern Road since [REDACTED] together with his Wife. He is no relation to Mrs [REDACTED] R [REDACTED] who also gave evidence in support of the Application. He used the West Side daily between then and May 2009 to exercise his dog each evening after work and during the morning at weekends, and regularly met other dog walkers on the Land who lived in the neighbourhood. Therefore, he was using the Land when the photographic survey was undertaken. In terms of the route he generally took, he went onto the West Side at the corner of 31 Fern Road where he let his dog off the lead and then followed his dog wherever she ran. There was not a planned route that he took. He then went back onto Fern Road to walk round the block or went through the woods at the back of his house. It was quite rare for him to use the East Side. In addition, he went blackberry picking on the West Side, but not on the East Side. He also used the East Side for tobogganing during periods of snow together with friends and their children who came to visit. In his questionnaires, he stated that he had picked blackberries on both parts of the Land and had not referred to tobogganing on the Land, and he accepted that they were inconsistent with his witness statement. However, he confirmed that his witness statement was correct. He has seen children playing on the Land, particularly during the evenings, weekends and school holidays, although he was unaware where they lived. There have never been any restrictions preventing public access to the Land, including when workmen were on the Land digging trial pits.

4.21 He was not involved in initiating the Application, but has always offered his support for it. He objected to the application for a Certificate of Lawfulness for the residential development of the East Side. In his objection on 29 September 2007,<sup>22</sup> he pointed out that the East Side was “*an invaluable habitat for the wildlife*”, but he acknowledged that he made no reference to the recreational use of the East Side. Further, the petition he signed made no reference to its recreational use.

4.22 Mrs [REDACTED] B [REDACTED]<sup>23</sup> has lived at [REDACTED] Fern Road since [REDACTED]. Prior to that, she lived at [REDACTED] Hollington Park Road, also within the neighbourhood, between [REDACTED] and [REDACTED]. Her parents lived at [REDACTED] Fern Road, and she lived with them between [REDACTED] and [REDACTED]. She has used the Land for over 40 years, initially with her parents when they went blackberry picking on the Land. Subsequently, between around 1974 and 1980, she played with [REDACTED] on the Land when [REDACTED] growing up, but she acknowledged that was outside the relevant 20 year period. [REDACTED] However, she did not live in the neighbourhood between [REDACTED] and [REDACTED]. When she lived at Hollington Park Road from [REDACTED] onwards, she visited her Mother almost daily. To do so, she walked to the top of the steps at Marlborough Close and then walked diagonally across the southern part of the East Side to the drive at 31 Fern Road. In addition, she walked her various dogs approximately four or five times per week on one or other part of the Land for over 40 years until it was fenced off in May

<sup>21</sup> His written evidence is at AB section W tab 6.

<sup>22</sup> OB3.

<sup>23</sup> Her written evidence is at AB section W tab 9.

2009, probably using the West Side more frequently. She deliberately went onto the grass to exercise her dog. She did not take the most direct route along the footpath as the purpose of her walk was to exercise her dog. On the West Side, she got onto the Land at 31 Fern Road and walked across the Land to the bridge by the stream and then on into the wood if it was not too muddy. She returned via the same route. On the East Side, she walked across the grass from the steps to the drive at 14 Fern Road. She also walked on the northern side of the footpath where she had seen orchids growing in approximately 2008. They were visible from the path, although she looked at them from the grassed area. She often walked with other dog walkers. She did not always see others using the Land, but probably did so approximately two or three times per week, especially at weekends. Since 2005, she used the West Side more frequently. There were never any notices or barriers restricting her access to the Land until May 2009, and she was never asked to leave the Land.

4.23 The footpath across the Land was very well used, especially by children going to and from school. Attached to her written evidence is a photograph showing the field at Celandine Drive. She also used to walk her dog on that land frequently before it was developed. As to the questionnaire, she initially picked up a leaflet from outside Mr M█████'s garage and then contacted him. He did not advise her as to what to put in the questionnaire and gave her no specific instructions as to what to say.

4.24 Mrs ██████ H█████<sup>24</sup> has lived at ██████ Wentworth Way since November ██████ with her Husband and ██████ Children who were then aged ██████ and ██████. In the following few years, they often went onto the West Side of the Land to fly kites, pick blackberries, play games and walk the dog. As ██████ got older, ██████ used the West Side of the Land frequently to play cricket and football with his friend from the shop on Fernside Avenue between ██████ and ██████. They set out cricket stumps there and often played football. She did not go to the Land with them. They were constantly on the West Side during that period as it was a safe place to play. They did not play on the East Side because it was boggy. During the winter, the Land was often used for tobogganing, and during August and September, it was frequently used for blackberry picking. From ██████ until ██████ when her dog died, she walked her dog on the West Side of the Land at least three times a day. He was kept on a lead and he went straight down to the brambles. Thereafter, she has not had a dog, but she continued to use the West Side as she looks after and walks her friends' dogs approximately 5 or 6 times a year for a week at a time. When she was looking after them, she would use the West Side three times per week, but less frequently otherwise. The East Side was much boggier than the West Side. She saw other dog walkers using both sides of the Land.

4.25 There is an area of open space beyond the railway, but it was necessary to walk across the railway to access it until the bridge was built around 15 years ago, so it was unsafe. There is now a cut through to the open fields beyond, but it is necessary to cross Harley Shute Road which is a busy main route. The houses on Wentworth Way are mock Georgian semi-detached properties which are of a separate character to others in that area.

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<sup>24</sup> Her written evidence is at AB section W tab 2.

4.26 Miss ██████ B ██████<sup>25</sup> has lived at ██████ Hollington Park Road since ██████  
██████.<sup>26</sup> Prior to that, between ██████ and ██████ she lived in Warren Close, and  
before that she lived ██████ at Hollington Park Road.

4.27 As a child between ██████ and ██████, she regularly walked the family dog  
most days on both sides of the Land which was a safe place for her to walk the dog  
unaccompanied. During her childhood, she also used the Land during snowy  
conditions for sledging and playing, as did dozens of other children from the local  
area whom she recognised from school. In addition, her Mother took her and her  
Sister to the grassland on the northern part of the East Side to look at different  
grasses, plant life, insects, birds and wild animals. From ██████ when she was ██████, she  
walked the two new family dogs on both sides of the Land. From ██████ when she had  
moved to Warren Close, which is outside the neighbourhood, she continued to walk to  
her parents' house to visit them and the dogs via the Land, often taking her own dog  
which she acquired in ██████. She would often walk across the grassland on the East  
Side from the corner of 14 Fern Road diagonally to the top of the steps and the bottom  
of the alleyway in Marlborough Close. Many people used that same route as there was  
a defined well-trodden route there across the grass. There were other defined routes at  
the top part of the East Side on either side of the footpath, especially to the south of  
the footpath. She saw people using the Land for dog walking, relaxing, playing and  
blackberry picking. She moved to her current address after the Land had been fenced.

4.28 She pointed out that the neighbourhood has a real community feeling and  
spirit to it. The neighbours stop and chat to each other and tend to know others in the  
neighbourhood. Although the area does not have a pub or a post office, it has a local  
convenience store, hairdressers, pizza shop and a bakery. She referred to an Estate  
Agent's Notice relating to 4 Fernside Avenue<sup>27</sup> which stated that the property was "*in  
the Gillsmans Park area of St Leonards*", and pointed out that her own house hunting  
had been within the neighbourhood as identified in the Application.

4.29 Mr ██████ B ██████<sup>28</sup> has lived at ██████ Gresham Way with his Wife since  
██████. He has used the Land from ██████ onwards. They acquired a border  
collie in ██████ and his Wife exercised it on the Land daily whilst he exercised it  
on the Land at weekends until it was fenced in May 2009. They threw a ball or a  
frisbee on the grassed area for their dog to chase. They mainly used the West Side and  
only occasionally the East Side as the ball could roll into the road from the East Side  
but only into the bushes on the West Side. They predominantly walked around the  
perimeter of the West Side, but also across it. They often met other dog walkers on  
the Land. They were using the Land at the time when the photographic survey was  
carried out. Children played on the East Side of the Land during the evenings and  
sledged on it when it snowed, but he was unaware where they lived.

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<sup>25</sup> Her written evidence is at AB section W tab 5.

<sup>26</sup> She was intending to move to Fernside Avenue in May 2012.

<sup>27</sup> AP9.

<sup>28</sup> His written evidence is at AB section W tab 12.

4.30 Mr [REDACTED] S [REDACTED]<sup>29</sup> has lived at [REDACTED] Marlborough Close since [REDACTED]. His [REDACTED] Children lived there with him and his Wife between [REDACTED] and [REDACTED]. They did not live within the neighbourhood thereafter. Given the elevated position of his house, he has good views over both parts of the Land from his garden.

4.31 They exercised their two dogs on the East Side, on both the areas to the north and south of the footpath, at least 5 times a week between [REDACTED] and [REDACTED]. Subsequently, they exercised their present dog they acquired in [REDACTED] on the Land between [REDACTED] and 2009 when it was fenced. The route he took from the top of the footpath on the East Side was to walk along the eastern edge of the northern part and then down to the road. He then walked across the small triangular area on the West Side, and either down the footpath towards the bridge or down to 31 Fern Road. They witnessed many others walking their dogs on the Land on a regular basis. When walking to the local shops in Fernside Avenue, they regularly used a well trodden path across the southern part of the East Side from the corner of their rear garden to the corner of 14 Fern Road. Between [REDACTED] and [REDACTED], they used the Land to play ball games and to fly kites, and during the snow they all enjoyed sledging down the slope. Two of their grandchildren, who live outside the neighbourhood, also used the Land until May 2009. They have seen other children playing on the Land, people sunbathing there in the summer, and young people congregating there, but he was unaware where they lived save for two children from Marlborough Close, the dates when such uses occurred or the frequency of such uses. Between October [REDACTED] and May 2009, he and his family have enjoyed unrestricted access to the Land. Even when ground investigations were being carried out, he was invited by one of the workmen to look down the hole to see the rising water.

4.32 He was involved in collating questionnaires to support the Application. The areas he covered were Marlborough Close, part of Avondale Road, part of Hollington Park Road and a small part of Gillsman's Hill. Of those households that responded, which was over 80%, approximately 60% to 70% indicated that they used the Land. However, he accepted that out of the 900 households in the neighbourhood, only approximately 150, namely around 16%, completed a questionnaire. He acknowledged that the questionnaires did not indicate which parts of the Land the respondents used, the frequency of their use, or the period of their use. He also organised the petition objecting to the planning application made in 2008 for the residential development of the East Side. He did not recollect having prepared the document submitted with the petition stating the grounds of the objections,<sup>30</sup> but acknowledged that it made no reference to the recreational use of the Land.

4.33 Mrs [REDACTED] B [REDACTED]<sup>31</sup> has lived at [REDACTED] Hollington Park Road since [REDACTED] with her Husband. Their two Children were then aged [REDACTED] and [REDACTED]. From [REDACTED], she has used both sides of the Land to walk and train the various family dogs. From [REDACTED] onwards, she walked the dogs daily, and walking on the Land was nearly always incorporated into the walk. The route she described as using across the Land was to walk down the steps on the East Side or around its perimeter to the road, and then to cross the grass on the West Side to the bridge. Others took that route. They lost their then only dog, Zoe, in [REDACTED], but she continued to walk her daughter's dog on the Land thereafter.

<sup>29</sup> His written evidence is at AB section W tab 7.

<sup>30</sup> OB5.

<sup>31</sup> Her written evidence is at AB section W tab 11.

She also picked blackberries from the hedgerow on the eastern edge of the East Side, and her family used the Land for tobogganing in snowy conditions, together with many other children and families although she was unable to identify them. The Land was a magnet for children from quite a wide area when it snowed. However, she noted that they would live within walking distance as the roads would not be drivable in such conditions. She regularly saw other local residents using the Land, predominantly dog walkers, and there were clearly defined paths over the grass. In addition, she occasionally saw people picking blackberries, and relaxing on the grass in sunny weather.

4.34 She also walked her dogs on the fields at the rear of Celandine Drive until around 2005 when it was developed. That was a very popular area for dog walkers, which was sadly missed when it was lost. It was a large field that was safe and a lovely area for dogs. It was possible to go into the woods from that field. Many people used it.

4.35 Mrs ██████ R ██████<sup>32</sup> has lived at ██████ Marlborough Close with her Husband since ██████. Their house backs onto the East Side of the Land. She is now retired, having previously been ██████. Until work was carried out to their garden, it was so steep that it was virtually impossible to play on. It was steeper than the Land. Her and her Husband used the Land daily from January ██████ until May 2009 for dog walking. They always had at least one dog throughout that period. They used both sides of the Land. On the East Side, their usual walk was either to cross the grass diagonally from the footpath to the corner of 14 Fern Road where there was a trodden diagonal path or to walk along the eastern edge of the southern part and then down the southern edge to the road. They never walked below the diagonal as that area was often wet. On the West Side, they usually walked corner to corner from 31 Fern Road to the stream or along its western edge. Access to the Land remained possible during the site investigatory trial in March 2006 and the drilling of boreholes in November 2007. She had been to Celandine Drive Fields, but not often.

4.36 She also used the Land infrequently when her cousins' children from ██████, who therefore live outside the neighbourhood, have visited when she went on the Land to play with them. In addition, she has used the Land infrequently for blackberry picking; and to study the plants. The grass was left unmown in the northern part of the East Side for a few years because of its recognised value. They did not trample on the grass there but walked round it on the mown border. There was a one metre border cut along the steps and along the eastern and western edges. The grass was kept long being around May and September. She never saw anyone using the long grass. The area started being mown again when the fence was erected. She has seen sledging on the Land, people blackberry picking, playing with balls or kites and numerous dog walkers.

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<sup>32</sup> Her written evidence is at AB section W tab 16.

4.37 Mrs ██████ S ██████<sup>33</sup> has lived at ██████ Marlborough Close with her Husband since ██████. She did not address the issue of use of the Land but, rather, her evidence addressed the issue of the petition that was produced to the local planning department to object to the planning application for the residential development of the East Side. At that time, she and her Husband had no knowledge of the process relating to town or village greens.

4.38 Her husband collected the signatures, and she had compiled the document attached to it afterwards at the request of the planning department.<sup>34</sup> She then compiled it using guidance that had been provided by the planning department which identified relevant planning matters.<sup>35</sup> That document was therefore not seen by people when they signed the petition as it had not then been produced. She was unable to confirm that each of the 16 grounds of objection listed in that document were discussed with the petition's signatories, but they were broadly the reasons people who had signed the petition had given to her Husband. She acknowledged that none of the 16 reasons referred to the Land being used for recreational purposes, but pointed out that the purpose of the petition was merely to have the application considered by the planning committee. She was not aware that anyone who signed the petition had raised that as an issue, but she was not present when the signatures were collected by her Husband.

4.39 Mr ██████ C ██████<sup>36</sup> is a retired Architect and Town Planner, having retired in ██████. He previously worked for Hastings Borough Council. He has lived at ██████ Fern Road since ██████. His house abuts the West Side of the Land, and there is a private gate leading from his garden onto the Land.

4.40 His Children used the West Side as an extension to the garden and played there with other children principally from Fern Road and Gillsman's Park. Their use of the Land was never restricted. Between ██████ and ██████ when his Children were young, he played games with them on the Land. He and his Son flew model aeroplanes on the Land. However, those uses of the Land were all prior to the start of the relevant 20 year period. More recently, he has walked over the Land, looking at interesting plants and wildlife, picking blackberries in the season, and admiring the tree species. However, he acknowledged that he was unable to be precise as to the dates of those activities or the extent to which they involved walking on the footpath. He produced a plan showing the location of existing brambles on the Land and also the location of brambles that were cleared in October 2008.<sup>37</sup> He has always enjoyed unrestricted access to the Land. He has seen others using the Land for recreational purposes, but was unaware where they lived. It is used extensively by dog walkers from the neighbourhood.

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<sup>33</sup> She produced a written statement dated 28 September 2011 at AP11.

<sup>34</sup> OB5.

<sup>35</sup> AP13.

<sup>36</sup> His written evidence is at AB section W tab 17.

<sup>37</sup> AP5.

4.41 As to the Objectors' photographic survey, he acknowledged that only one photograph of the 650 taken showed a person on the Land who was not on the footpath. It was not his case that the photographers sought to mislead, that the photographs were staged nor that there had been a sudden change in local use of the Land post the submission of the Application.

4.42 He was involved with identifying the neighbourhood together with Mr M [REDACTED]. Its boundary is self-apparent from a plan of the road network. It is based on those households who are likely to migrate to the local shops and to the Land from their local knowledge. Some of the properties within the neighbourhood are old whilst others were built post 1989. There is a mix of house types and designs in the neighbourhood, including detached, semi-detached, terraced, town house, apartments and bungalows, although the core of the neighbourhood has its own particular characteristics. Moreover, the neighbourhood is bounded by main roads and a railway line. The local community is generally referred to as the "Gillsman's Park / Fern Road" area. That is not an official name, but is used by estate agents, although he was unable to produce any estate agent particulars referring to that particular name save that produced by Miss B [REDACTED],<sup>38</sup> and he acknowledged that no boundary had been provided that that estate agent was referring to. The shops in Fernside Avenue serve the local community with day to day commodities and services and are well supported by the local community. They currently comprise a Tesco Express with external cash machine, post box, bakery, take away local delivery pizza and hairdressers. There is a strong sense of local community with social events arranged in the community. The ladies have a monthly coffee evening and there is a monthly walk. Neighbours keep an eye on each other's properties, feed each other's pets when away, and hold house keys for each other. There was a neighbourhood watch scheme in the past, and there is a local residents' association. He identified the number of dwellings in the neighbourhood as being 865 as shown on the table he produced.<sup>39</sup>

4.43 As to the questionnaire survey, he went round the west side of Fern Road and round The Drive in January 2009. Approximately 20% did not answer the door, but of the remainder, only one declined to complete a questionnaire. He went out around Fern Road again in May 2011 and gave out further questionnaire forms. He was not involved in compiling the questionnaires. The submitted statutory declarations were sworn at his house in the presence of one J [REDACTED] S [REDACTED], a Solicitor, who lives at [REDACTED] Fern Road. She stressed to each individual the seriousness of the matter and that it must be truthful.

4.44 Mr [REDACTED] O [REDACTED]<sup>40</sup> has lived at [REDACTED] Marlborough Close since [REDACTED] when his [REDACTED] Children were aged [REDACTED] and [REDACTED]. He is now retired, having been a Certified Accountant. He has used the grassed areas of the Land for walking, dog walking, playing games with his Children when they were young up until around [REDACTED], picking blackberries, watching wildlife and playing in the snow, and has seen other local people using the Land for such purposes. His main use of the Land was for walking dogs, which he walked daily, and he walked them on both parts of the Land, but mainly on the East Side. His use of the West Side was sporadic. He had at least one dog between [REDACTED] and [REDACTED], and between [REDACTED] and [REDACTED]. Occasionally he used

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<sup>38</sup> AP9.

<sup>39</sup> AP14.

<sup>40</sup> His written evidence is at AB section W tab 19.

the footpath, but his dogs preferred walking on the grass rather than down the steps so he usually walked round the steps on the grass, mainly on the southern side of the steps. The East Side became waterlogged during the winter near to the road, but not the West Side. There were well worn paths on both parts of the Land. On the East Side, there was a well worn path along the very edge of the brambles at the top of the hill, namely round the perimeter, and then down to Fern Road. He walked his dogs along that worn path. There was also a well worn diagonal route on the southern side of the footpath leading to 14 Fern Road. Other dog walkers used those routes. He picked blackberries on the East Side from the worn paths, initially from both sides of the footpath but latterly just on the southern side. He did not pick blackberries from the West Side, but saw others doing so.. He also walked on the grass himself when he went to sit on it to admire the views across the valley. He had played ball games with his Children on the northern part of the East Side, but the land was boggy and uneven in contrast to the southern part. The East Side was cut around once a year whilst the West Side was cut about four times a year. He has always enjoyed unrestricted access to the Land until 2009.

### **Written Evidence in Support of the Application**

4.45 In addition to the evidence of the witnesses who appeared at the Inquiry, I have also considered and had regard to all the written evidence submitted in support of the Application in the form of additional evidence questionnaires, statutory declarations and letters in support which are contained in the Applicant's Bundle.

4.46 However, whilst the Registration Authority must also take into account all such written evidence, I and the Authority must bear in mind that it has not been tested by cross examination. Hence, particularly where it is in conflict with oral evidence given to the Inquiry, I have attributed such evidence less weight as it was not subject to such cross examination.

### **CASE FOR THE OBJECTORS**

#### **Oral Evidence Objecting to the Application**

4.47 Mrs ██████ G ██████<sup>41</sup> worked for The Park Lane Group as the Group Secretary between ██████ and ██████. During the course of that employment, she visited the Land on three occasions. In the summer of 2008, she met a contractor on the Land one early afternoon during the working week to discuss the grass cutting regime the Company wished him to provide a quotation for in relation to both parts of the Land. Her impression of the Land at that time was that it was more in the nature of wasteland than a recreational area due to the uneven nature of the ground on the East Side and the contractor's concerns about damaging his mowing equipment. Moreover, it was overgrown as the grass was long and unmown in that area with overgrown brambles. The Land slopes and it would be quite difficult to play sports on it. It was not parkland, and she would not have taken her Children to play there. It would be suitable for dog walking, but she did not see any dog walkers on the Land. She was on site for approximately 15 minutes. She did not walk on the Land, but spoke to the contractor whilst on the pavement. At no time did she observe anyone using the Land. Had she done so, health and safety issues would have arisen as part of her discussions, which would in turn have had financial implications. She again attended the site later that summer one afternoon during the working week when she

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<sup>41</sup> Her witness statement is at OB3 page 691.

was on site for approximately 30 minutes, but she spent the majority of that time in the wooded area at the back of the West Side. She did not observe anyone using the Land. Her third visit to the Land was later in 2008 during the working week when she was on site for around 20 minutes. She walked over the Land on both sides, but did not see anyone using it. From her visits to the Land, she saw nothing to indicate that the Land was in use by the local community for lawful sports and pastimes.

4.48 She acknowledged that in total she has only been on the Land for just over an hour during the Summer of 2008. Moreover, her three visits were all during the working day during the week. They were made prior to the submission of the Application. She further acknowledged that her purpose for visiting the Land was not to monitor its use and she may have missed something whilst she was talking to the contractor. Nonetheless, she had no recollection of anyone using the Land during those visits. She did not recollect seeing anyone using the footpath on those occasions.

4.49 Mr ██████ G█████<sup>42</sup> is a sales representative for Plumbing Trade Supplies Limited, and The Park Lane Group has been a customer for approximately seven years. He is not local to the area. He drove past the Land about once a fortnight for a period of nine months to a year ending around July 2009 between the hours of 3pm to 6pm during the working week for the purposes of visiting a customer. He never had cause to stop his car in the vicinity of the Land, but always drove straight past. He never saw anyone using the Land on those occasions, either on the grassed areas or on the footpaths, nor did he see people in the area generally, and he did not gain the impression that the Land was being used for lawful sports and pastimes. He was unable to recall whether he drove past the Land during any school holidays. He did not recall anything changing in relation to the Land during that nine month period, and accepted that he had not noticed the erection of the fences. He further acknowledged that he “*wasn’t paying great attention to the Land*” as he drove past.

4.50 Mr ██████ O█████<sup>43</sup> has lived at ██████ Priory Close in Hastings since ██████ which is approximately two miles from the Land. He has owned a business selling and repairing domestic appliances in St Leonards on Sea since ██████. He has not been employed by The Park Lane Group, but did supply some appliances to that Company in ██████. He was contacted by the Company and asked if he had visited the Land and whether he had noticed any activity there. For his business, he constantly drives around the area, mainly on weekdays within working hours. Since 1992, he has regularly driven past the Land, on average on a weekly basis, and has never seen any activity taking place on the Land. He also drove down Fern Road on occasions between 1997 and 2005 when his Children attended the now closed Westerleigh Preparatory School located close to the Land on Hollington Park Road, usually to drop them off in a morning between 8am and 8.30am, but did not recall seeing anyone on the Land then. He did not see any other school children in the vicinity on those occasions. Fern Road was generally quite quiet when he drove along it. He was unaware that there was a footpath crossing the Land. He acknowledged that it only takes seconds to drive down Fern Road, and that he would not particularly have been looking on the Land when he was driving as he had no reason to be focusing on the

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<sup>42</sup> His witness statement is at OB3 page 747.

<sup>43</sup> His witness statement is at OB3 page 829.

Land. There is a considerable slope on the Land and he did not consider that lawful sports and pastimes could be carried out on the Land. It could be used for dog walking, but he had never seen any dog walkers using it.

4.51 Mr ██████ W█████<sup>44</sup> lived at ██████ Fernside Avenue between approximately ██████ and ██████, and then moved to his current address at ██████ Rowan Close which is approximately three miles from the Land. He has no connection with any of the Objectors nor with The Park Lane Group. He has worked as a postman for Royal Mail for around 30 years during which he has occasionally had rounds delivering post to Fern Road, although it was never his regular round. He does “relief” rounds. Therefore, he would do that round once every two months or so when someone was on holiday or off sick. During all the times he did deliveries and collections of post along Fern Road, he only ever saw the footpaths on the Land in use, particularly by dog walkers, and not other parts of the Land. Collections would merely involve him driving past the Land down Fern Road. Post deliveries would be in the mornings, and not on Sundays. However, the round did not involve him walking past the Land as there were no houses there. The round finished at 14 and 31 Fern Road.

4.52 In addition, he used the footpaths twice daily between 1993 and 2001 when walking his dogs on his way to the Marshes near South Saxons when he lived in Fernside Avenue. The footpaths were used regularly. The footpath across the East Side was used daily, often by school children. On those occasions, he never saw anyone using the Land save the Borough Council when cutting it, and other dog walkers allowing their dogs to run around on the West Side while they stood on the footpath or on the footway. He rarely saw people go onto the grass on the West Side, but they sometimes did. It was very uneven. The East Side was used by children walking to and from school who used the footpath. It slopes and is very wet. In addition, people took a diagonal shortcut across the southerly part of the East Side from the top of the footpath to the corner of 14 Fern Road. He has never seen the Land used for any sports or any other activities.

4.53 He acknowledged that the Land was always open until recently, and that there were quite a few dog walkers in the area. Moreover, he accepted that he would not particularly notice whether people were on the Land when he was delivering post and there was no reason for his focus to be on the Land.

4.54 Mr ██████ R█████<sup>45</sup> lived at ██████ The Green for approximately ten years until 2003. He currently lives at ██████ Havelock Road in Hastings. Both properties are outside the identified neighbourhood. Between 1988 and 1994, he travelled along Fern Road on his way to and from work. From 1994 until 2005, he drove past the Land two or three times per week Mondays to Saturdays while practising as an Estate Agent. His firm received instructions to market the Land in September 2005. Since 2005, he has continued to use Fern Road two or three times per week. Only once has he witnessed any activity on the Land apart from on the footpath, which was when some children were tobogganing. He usually saw children on the footpath on the East Side around school closing times. He has not seen people walking on the footpath on the West Side. He has not seen dog walkers on the footpaths and has not seen anyone on the

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<sup>44</sup> His witness statement is at OB4 page 1144.

<sup>45</sup> His witness statement is at OB4 page 1047.

grassed areas. He acknowledged that he had only walked past the Land once, and he has never used the footpaths across the Land.

4.55 As an Estate Agent, he pointed out that the Gillsman's Park area is highly regarded comprising 4 or 5 bedroom detached properties and is particularly exclusive. It includes Fern Road, Fernside Avenue and Gillsman's Park. In contrast, Wentworth Way and Muirfield Rise comprise mainly semi-detached properties, whilst Albourne Close has mainly one bedroom starter homes.

4.56 Mr [REDACTED] F [REDACTED]<sup>46</sup> has been employed as a civil engineer by Stephen Wilson Partnership Limited since [REDACTED]. They were instructed by The Park Lane Group to provide advice on drainage and foundation issues concerning the Land in 2008. He duly inspected the Land for that purpose on 20 June 2008 which was his first knowledge of the Land. His visit was on a working day at around 8am – 8.30am and lasted for approximately 30 minutes. His primary interest was in the part of the East Side nearest the road and the area nearest to the footpath on the West Side. He did not see anyone on the Land during that visit and the photographs he took showed nobody on the Land. He visited the Land again sometime in 2010 for approximately 40 minutes, and did not see anyone on the Land including on the footpath during that visit. He could not recall whether the Land was fenced during his second visit. He has not visited the Land other than on those two occasions.

4.57 Mr [REDACTED] O [REDACTED]<sup>47</sup> is an Architect who has been employed by RDP Architects since [REDACTED]. In 2008, that practice was appointed by The Park Lane Group to design residential dwellings for the East Side of the Land. Between September and October 2008, he visited the Land regularly, approximately once every two weeks, and so he visited on around four occasions. His visits were on a week day during the morning sometime between 9am and 12 noon, and each visit lasted about 1 hour. He took photographs of the Land in October 2008. He did not recall seeing anyone on the Land during those visits save that on one occasion he saw around three people using the footpath on the East Side. His emphasis during his visits was on the East Side as that was where the houses were being proposed. Moreover, he accepted that he was not employed to report to the Company about the use of the Land or the footpaths and any such use would not have been referred to in his report. Nonetheless, he saw nothing to indicate that the Land was in use by the general community for lawful sports and pastimes.

4.58 Mr [REDACTED] M [REDACTED]<sup>48</sup> is an Architectural Assistant who has been employed by WAS Chartered Architects since [REDACTED]. That Firm was instructed by The Park Lane Group to survey the gradient of the slope of the Land on both sides. As a result, around October 2005 and in January 2006 during working hours, he visited the Land for that purpose to take site levels. He was on site for approximately 90 minutes on each visit during which time no-one approached him and he did not have to stop his work to allow anyone to pass. He did not see anyone on the Land on those two occasions, although he accepted that the purpose of his visits was to measure the gradient and not to report on the use of the Land, and his attention would have been focused on taking readings rather than on whether any people were around.

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<sup>46</sup> His witness statement is at OB3 page 739.

<sup>47</sup> His witness statement is at OB3 page 802.

<sup>48</sup> His witness statement is at OB3 page 793.

In addition, as a resident of Hastings over the past seven years, he has driven along Fern Road on his way to other places approximately once per month prior to January 2009. On no occasion did he recall having seen anyone using the footpaths or the grassed areas comprising the Land.

4.59 Mr ██████ B█████<sup>49</sup> is a Chartered Architect who has worked for Baker Architectural Services LLP since ██████. Prior to that, he was a partner at Wealden Architectural Services for 21 years. Around the late 1990's, he received instructions from The Park Lane Group. He first visited the Land on 15 September 2005 at 11.45am for approximately 15 to 30 minutes to ascertain the feasibility of its development. During that time he did not recall seeing anyone using or crossing the Land nor were there any signs of wear and tear to suggest that the Land was in active use, such as evidence of goalposts or cricket stumps having been on the Land. However, he recalled a diagonal worn track across the southern part of the East Side. His second visit was on 3 January 2006 during working hours for around 10 to 15 minutes for the purpose of producing an outline proposal for the Land's development. He looked at each part of the Land separately. He could not recall whether or not he observed anyone on the Land during that second visit. On neither visit was it any part of his brief to record any use of the Land. Moreover, he had not taken any note as to whether anyone was on the Land. No one approached him to ask any questions. He did not walk on the West Side nor on the southern part of the East Side. He acknowledged that he would not have particularly noticed dog walking on the Land, but he would have noticed formal or informal sports taking place. Around 2008, he drove past the Land on three occasions, but he did not recall seeing anyone on the Land on those occasions.

4.60 Mr ██████ H█████<sup>50</sup> has lived at ██████ Vale Road since ██████ which is around 1½ miles from the Land and is not within the neighbourhood. He owns the Company, RHS Property Maintenance Limited, and since ██████, the vast majority of the works he has done is as a contractor for The Park Lane Group. He knew the Land as a child prior to the relevant 20 year period. He never used the Land then as it was extremely unstable and cracks could be seen. It was also very muddy on both sides, particularly on the East Side. Between ██████ and ██████, he lived in Manor Road, about six miles from the Land, when he would drive past the Land around once a week. Further, for a two year period during the mid-1990's, he worked nearby and drove past the Land virtually every working day. In the last few years, he has driven past the Land about once a week, and approximately every five or six months he walks along the stream from which he could see part of the Land. However, the limited extent of that view from the bridge is as shown on one of the Objectors' photographs.<sup>51</sup> He has never seen anyone on the Land on any of those occasions save people walking on the footpath on the West Side. He has never seen any activities such as sports, picnicking, tobogganing or blackberry picking on the Land, although he has never been to the Land in snowy conditions.

4.61 In 2009, he was asked by The Park Lane Group to undertake some observation of the Land and to take photographs on the hour, noting whether anyone was on the Land. He attended on 7 and 15 March 2009 for that purpose and referred to the

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<sup>49</sup> His witness statement is at OB3 page 559.

<sup>50</sup> His witness statement is at OB3 page 751.

<sup>51</sup> OB4 page 1020.

photographs he had taken. Some were taken from inside his car and for others he got out. He acknowledged that not all the photographs showed all the Land. There was no one shown on any of the photographs. He did not see anyone on those occasions apart from one person on the footway along Fern Road.

4.62 Mr ██████ O ██████<sup>52</sup> has lived at ██████ Gillsman's Park for approximately ██████ years. He had a dog until ██████ which he walked daily on a circular route and he used the footpath crossing the West Side of the Land. His dog would go onto the Land as it would be off the lead. He saw others using that footpath, and sometimes he saw people walking on the grassy area on the West Side, usually dog walkers, but the majority of dog walkers stayed on the footpath. He has not seen dog walkers using the footpath on the East Side, but people did use both footpaths for general walking. After ██████, he only walked that route once or twice a week when he was visiting a friend. He has also driven past the Land returning home from work and cannot recall having seen anyone on the Land save on the footpaths. He has never seen any activities on the Land such as sports, picnicking, kite flying or games, and would not have expected to due to the slope and the poor terrain. The only activities he has seen on the Land are occasional blackberry picking along the boundary of the West Side in the season, and tobogganing on the rare occasions when there is sufficient snow when the East Side becomes "*a hive of activity*".

4.63 Mr ██████ M ██████<sup>53</sup> is a Badger Consultant instructed by The Park Lane Group around March 2006 to prepare a report on badger activity on the Land. He attended at the Land on 28 March 2006 during the mid-morning to investigate for signs of badger activity. He returned on 19 May 2006, 16 July 2007 and 1 July 2008 at a similar time of day, which were all working weekdays. He was on the Land, both the East Side and the West Side, for approximately an hour on each visit. He did not speak to anyone on those occasions, and he did not see anyone on the Land apart from two or three people on each occasion using the footpaths on both sides of the Land. He acknowledged that his focus was investigating badger activity and not to record people's use of the Land, and that he concentrated on the edges of the Land. He confirmed that the tracks on the Land were not made by badgers. He was struck by the lack of opportunity to talk to local people, and he expressed the view that "*the Land looked as though it ought to have people on it*".

4.64 Mr ██████ A ██████<sup>54</sup> is one of the Objectors, and he is involved in property development and construction together with his brother, Ryan Al-Hasso. In mid-2007, they had a number of dealings with The Park Lane Group, and he agreed to purchase a parcel of land at the northern end of the East Side of the Land which was completed in September 2008.<sup>55</sup> Since mid-2007, he has visited the Land on around 25 occasions, during working hours, and has never seen anyone on the Land, even on the footpath crossing the Land, or any of the claimed activities being carried out on the Land. He acknowledged that he would not be particularly looking for people using the Land, and that his particular interest was in the East Side and not the West Side. He also drives past the Land occasionally, and has never seen anyone on it. He lives in

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<sup>52</sup> His witness statement was produced separately on day 5 of the Inquiry.

<sup>53</sup> His witness statement is at OB3 page 797.

<sup>54</sup> His witness statement is at OB3 page 538.

<sup>55</sup> That parcel of the Land is shown on the plan at OB1 page 42.

Bexhill, which is approximately five miles away and not within the identified neighbourhood.

4.65 Mr [REDACTED] A [REDACTED]<sup>56</sup> is in business with his brother, [REDACTED] A [REDACTED]. He first came to know the Land in 2007 when his brother was considering purchasing a parcel of it. He visited the Land around four or five times, when he walked all over the Land on both sides of Fern Road, and has driven past it on at least 20 occasions. He did not recall seeing anyone on the Land on any of those occasions nor any of the claimed activities being carried out, although he acknowledged that he was not specifically focused upon whether anyone was using it. He took photographs of the parcel of the Land his brother was acquiring on 28 January 2008, taken within working hours on a working day. There is no one shown on the photographs. His particular interest was in drainage, and he noted that the East Side was very soggy.

4.66 Miss [REDACTED] B [REDACTED]<sup>57</sup> is an Accounts Assistant for The Park Lane Group which she has worked for since [REDACTED]. She has never lived in the neighbourhood. Between 5 March 2009 and 8 April 2009, she was involved in a photographic survey of the Land on behalf of the Company. She was requested to take photographs at hourly intervals throughout the day of as much of the Land as possible for the purpose of ascertaining whether anyone was using the Land. She was told to take two photographs on each visit, namely one of the East Side and one of the West Side. She duly attended the site on 38 occasions between those dates during the hours of 8am and 5pm Monday to Saturday for approximately three to five minutes on each visit. Two of her visits were on a Saturday. She drove to the area, took the photograph, and then drove off to the office, making it around a 15 minute round trip, namely 5 minutes there, 5 minutes on site and 5 minutes back. She did not wait until there was no one on the Land before she took a photograph. Some of the photographs were taken from in the car, and some were taken whilst the car was moving although for the majority of the photographs they stopped. She referred to the photographs she had taken. She provided the comments on them relating to who was seen and the weather conditions by orally giving them to Sarah Warburton as soon as she returned to the office. Sarah then uploaded the photographs straight away and inserted the comments on them. The comments reflected what she had seen. She recalled occasionally seeing people on the footway or on the footpaths across the Land but not on the grassed area, and on the majority of occasions she did not see anyone in the area at all. If anyone had been on the Land at the time, she would have ensured they had been shown in the photograph.

4.67 Mr [REDACTED] B [REDACTED]<sup>58</sup> has provided consultancy services to The Park Lane Group for ten years. He is also a Director of and Shareholder in Witrose Developments Limited, one of the Objectors. He has been familiar with the Land since Spring 2006 since when he has visited the Land on numerous occasions. During all those visits, he has only seen people using the footpath and the footways along Fern Road. He was asked by Mr B [REDACTED] to undertake a photographic survey of the Land in 2009 by having photographs of the Land taken at regular times which he arranged and he compiled a rota system. The intention was to try to take a photograph on the hour every hour. He instructed a number of people to take one photograph of each side of

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<sup>56</sup> His witness statement is at OB3 page 549.

<sup>57</sup> Her witness statement is at OB3 page 659.

<sup>58</sup> His witness statement is at OB3 page 564

the Land and to report back on any activity they witnessed. The locations for taking the photographs were not prescribed, and the times were merely to be within the hourly brackets. There were four or five different cameras used. He referred to the photographs he had taken, and agreed that some of them were very poor quality. He took some of them while he was still in the car. He also acknowledged that some of the photographs did not show all the Land, but the notes were able to identify whether anyone was on the Land in its entirety. There was no one present on the grassed part of the Land at all on any of his photographs. He only saw people using the footpath or footways. He accepted that people may have used the Land when the photographs were not being taken. The process he used was to drive to the Land, take the photographs, make a note in the car of the time and whether anyone was present in the area, and drive back to the office. He left his notes and camera for [REDACTED] W [REDACTED] who uploaded all the photographs and used his notes. Given the number of photographs taken and the small number of people shown on them and who were all on the paths, he was very confident that the photographs reflected what was taking place on the ground.

4.68 On 20 July 2009, he visited a number of properties in Fern Road and one in Fernside Avenue and spoke to seven householders. They were specifically targeted as householders who had not provided an evidence questionnaire. They all confirmed to him that they had not used the Land for any of the claimed activities, and had not seen others doing so save for occasional tobogganing. They had seen people on the footpaths and on the pavements, but not carrying out recreational activities on the Land. However, he had no documentary record of those conversations. In addition, he has driven past the Land once or twice a week since 2006, but has never seen anyone on the Land apart from on the footpaths.

4.69 Mrs [REDACTED] P [REDACTED]<sup>59</sup> is employed by The Park Lane Group as a Lettings Administrator. Between [REDACTED], she lived at [REDACTED] Albourne Close which is within the neighbourhood. Approximately once a week between 1993 and 2002 she walked to work past the Land. Subsequently, from 2004 until 2011, she drove down Fern Road to and from work each workday, and between 2004 and 2007 she would drive down Fern Road on average four times a week during working hours as part of her job. Whilst she lived at Albourne Close, she regularly drove past the Land to go shopping or to visit friends, and when her grandchildren came to visit she went for a walk with them past the Land some four or five times a year during the weekends between 2005 and 2008. She would never have permitted her grandchildren to go onto the Land.

4.70 She took part in the photographic survey of the Land and referred to her photographs. She was not told how many photographs to take or where to take them from. There was no set time to take them as long as they were taken within a one hour period. She left as soon as she had taken the photographs so she was only present for a few minutes. Sometimes she stayed in the car. She took up to two or three photographs of each side of the Land. She was asked to record the weather conditions and whether she saw anyone. She noted those points in her head and then went straight back to the office where they were immediately recorded by Sarah Warburton. At weekends, she made a note on a paper pad which she took to Sarah the

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<sup>59</sup> Her witness statement is at OB3 page 837.

following Monday morning. Everything on the photographs has been accurately recorded. She visited the Land on 44 occasions for that purpose. The photographs reflect precisely what she saw at the time of her visits and, in her view, reflect the typical use of the Land.

4.71 During the many times she has passed or attended at the Land over an 18 year period, she has frequently seen people walking on the footpaths with and without dogs. Occasionally, dogs would be let loose on the grass area whilst their owner stayed on the path, but she never saw people walking on the grass, although she acknowledged that there was nothing to stop them from doing so. She assumed it was used by dogs to exercise and to foul. At school times, children walked on the footpaths, but they did not go onto the grass. She often saw school children on the footpaths in the afternoon at school closing time and sometimes sitting on the steps. On the rare occasion it snowed, she had seen children tobogganing on the slopes of the Land. However, she has never seen the Land being used for any other of the claimed recreational uses.

4.72 Miss [REDACTED] W [REDACTED]<sup>60</sup> was employed by The Park Lane Group from [REDACTED] as a Lettings Assistant. She is currently a Trainee Accountant. She drove from the office to undertake viewings, and estimated that she would have driven past the Land approximately 40 times between 2006 and 2009 during working hours. She recalled people using the footways along Fern Road to walk their dogs, and she occasionally saw one or two people using the footpaths across the Land to walk their dogs but they did not walk on the grass. At school closing time around 3.30pm there would be more people on the footpaths as The Grove School, a secondary school, was nearby. She never saw children playing on the grass on the Land.

4.73 She was involved in the photographic survey of the Land and she referred to the photographs she took. She attended on site 111 times between 2 March 2009 and 9 April 2009 at various times between 8.30am and 6.00pm for approximately five or ten minutes. She did not have a set place from where she took the photographs, and was not told how many photographs to take although she generally took two. When taking them, she saw occasional dog walkers on the footpaths and on the footways, but no other activity on the Land. She acknowledged that each photograph was only a snapshot in time and she could not say that people did not use the Land when she was not present. She recorded all the presence she saw in the area, even if the photograph was not taken at that particular time, and if someone was there, she would have recorded it. She was instructed to accurately record what she saw. When she returned to the office, she uploaded the photographs onto a computer virtually immediately and added her comments. She was responsible for the recording, and others generally gave her a piece of paper with their notes on. She then uploaded their photographs and typed what she had been told, using her own consistent style. If a sub-contractor had taken photographs and not left any notes, she called them to ask them what they had seen. If the photographs were taken over the weekend, she would deal with them on Monday morning. She used a consistent wording for the notes, but she did not alter the substance of what she was told.

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<sup>60</sup> Her witness statement is at OB4 page 1062.

4.74 Mr ██████ C ██████<sup>61</sup> is the brother-in-law of S ██████ B ██████. Around April 2009, he was requested by S ██████ to take part in a photographic survey of the Land that was being carried out to identify the use being made of the Land, which he did and was paid for doing. He referred to his photographs. He attended at site on 11 April 2009, a Saturday during the Easter Bank Holiday weekend, for two hours between 11am and 1pm during which he took four photographs. As there was no activity, he had no reason to take any further photographs. Had there been some activity, he would have taken a photograph of it. He walked both sides of the Land and sat in his car observing the Land for the remainder of the time. During that period, he did not see anyone using the Land or walking along the footpaths or walking dogs or anyone in the area at all.

4.75 Mr ██████ C ██████<sup>62</sup> is a self-employed Cleaner and has been cleaning for The Park Lane Group for around four years. He has never lived in the neighbourhood. In the late 1980's, he drove past the Land at least two or three times a week as part of his journey to or from work. He did not recall seeing anyone on the Land, even on the footpaths, or any recreational activities being carried out on the Land, or anyone on the footways, although he acknowledged that it only took 15 to 20 seconds to drive past the Land. He also drove past the Land in the early 1990's two or three times a month between September and April to pick up and drop off a friend when they played table tennis together. His recollection of the Land was the same at that time. After the mid-1990's, he only drove past the Land occasionally, maybe six times a year, and never saw anyone using the Land apart from dogs while their owners walked along the paths. Over the Easter Weekend in April 2009, he took photographs of the Land for the photographic survey for which he was paid. He stayed at the Land for approximately ten minutes every hour during daylight hours over the Friday and Saturday, and referred to his photographs. He was instructed to take photographs of any activity on the Land in every hour and also at his discretion and to attend the site for ten minutes on each occasion. His understanding was that he was to try to capture on a photograph anyone who was using the Land. Throughout those times, he saw a dog walker taking a short cut across the grass from the footpath to Fern Road and a couple of other people in the area. Otherwise, there was no one else on the Land when he was there and no recreational activities on the Land. He made notes at the time and handed them in when he returned the camera. As the dog walker was only on the grass for a few seconds, he did not have the opportunity to take a photograph, but he noted the activity.

4.76 Mr ██████ R ██████<sup>63</sup> has lived at ██████ The Links, within the neighbourhood, for around ██████ years. He has worked for Rother District Council for ██████ years and is currently the team leader in the development management section of the planning department. He has no connection with The Park Lane Group. As a teenager, he attended The Grove School (as it then was) and walked past the Land twice a day. Over the last ██████ years, he has passed the Land on numerous occasions at all times of the day and of the week.

4.77 In the 1960's, planning permission was granted for the residential development of the Land. Foundations were laid, but they moved and the developers

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<sup>61</sup> His witness statement is at OB3 page 714.

<sup>62</sup> His witness statement is at OB3 page 696.

<sup>63</sup> His witness statement is at OB4 page 1041.

stopped work. The Land was then left in a rough and overgrown condition. Nobody maintained the Land until around the mid-1980's when the Council started to mow the southern section of the East Side and the steps in the footpath were created. More recently, the northern section of the East Side and the West Side have been rough cut by the Council. The northern part of the East Side has always been susceptible to movement and difficult to cut because it was so uneven. The Land was unfenced until 2009 and occasionally he saw people walking across it, but only to take a short cut. It was used for tobogganing in the snow, but he did not recognise the children and they could have come from further afield than the neighbourhood. However, he never saw anyone having picnics on the Land, kite flying, playing ball games on it or carrying out any other recreational activities. All that could typically be seen were people using the footpaths, including school children, or taking a diagonal short cut across the southern part of the East Side, including dog walkers, between Marlborough Close and Fern Road. He acknowledged that dog walkers could also have taken a short cut across the West Side, but he had not noticed it. He had used the footpath on the West Side, but not on the East Side.

4.78 Mr ██████ P█████<sup>64</sup> lived at ██████ Albourne Close from ██████ until ██████ with his Wife who works for The Park Lane Group. During that period, he drove regularly along Fern Road, about three or four times a week, at various times of the day and of the week, including at weekends. He never used the Land, and had only driven past it. He acknowledged that he would not deliberately look at the Land when he was driving, but it would be in his peripheral vision. He recalled that during periods of heavy rain, the East Site suffered from slippage. He rarely saw anyone using the Land, although he observed people occasionally walking along the Fern Road footways to walk their dogs which would walk onto the grassy areas on their extended leads. He also saw children using the East Side for tobogganing when it snowed. The West Side was not suitable for that purpose as it slopes into trees, bushes and brambles. In addition, he saw people using the footpaths occasionally. The path on the West Side was used more, particularly by dog walkers. He did not recall the Land being used for any other purpose. He had never been approached by the Applicant or any other person to enquire whether he would be prepared to give evidence in support of the Application.

4.79 Mr ██████ K█████<sup>65</sup> has lived at ██████ Alma Terrace for around ██████ years, which is outside the neighbourhood but approximately half a mile from the Land which he has known all his life. As a child during the ██████'s, he walked past the Land, but never went onto it with his friends. It was steep and often wet and would be very difficult to play on. In the early 1980's, he drove past the Land on workdays on his way to and from work, and does not recall anyone using the Land apart from the footpaths. Thereafter, in the early 1990's, he drove past a couple of times a month. More recently, but after the Land had been fenced, he has driven past the Land frequently to visit his son who moved to the area. He has never seen anyone use the Land apart from the footpaths, and has never seen it used for picnicking, blackberry picking, ball games or tobogganing.

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<sup>64</sup> His witness statement is at OB3 page 833.

<sup>65</sup> His witness statement is at OB3 page 784.

4.80 Mr [REDACTED] R [REDACTED]<sup>66</sup> is the owner of a plumbing and maintenance company which undertakes work for The Park Lane Group on a contract basis. He has lived in Bexhill Road, which is outside the neighbourhood but approximately one mile from the Land, for around six years. Prior to that, he lived for five years about 1½ miles away from the Land. For the past eleven years, he has driven past the Land at least three times a week and up to a maximum of three or four times a day between the hours of 8am and 5pm Monday to Saturday. He has also regularly driven past the Land on Sundays over that period. He has never used the Land, which steeply slopes and is unsuitable for ball games and other recreational activities. During that eleven year period, he has observed people, particularly school children, using the footpaths crossing the Land, and he has also seen the occasional dog walker using the footpaths. However, he has not seen dog walkers on the grassy areas nor anyone using the grassy areas for any other recreational purposes. He was involved in the photographic survey and referred to his photographs. However, he was not aware of the reason the photographs were being taken. He was instructed to take a photograph of each side of the Land within a specified hour, to take the fullest views of the Land as possible, and to take a photograph of any activity. He was on site for an average of approximately seven minutes on each occasion, and made notes in a notebook he had with him. He could not recall the dates when he visited the site for that purpose, but it was usually at weekends as he would cover for others when required. He returned the camera on the Monday morning with his notes which Sarah Warburton entered on the computer, usually in his presence. He deleted the photographs that were not particularly good, and he agreed that on occasions he may have deleted the wrong photographs and made other mistakes. He further acknowledged that he was not a particularly good photographer and that he could have done a better job in retrospect. He did not see anyone using the Land when he was taking the photographs.

4.81 Mr [REDACTED] B [REDACTED]<sup>67</sup> owns his own building and maintenance company and carries out business for The Park Lane Group which his Uncle, Russell Beswick, runs. He was born in [REDACTED], and had a few friends who lived in Fernside Avenue. As a youngster, between around [REDACTED] and [REDACTED], he used the footpaths crossing the Land, mainly on the West Side, approximately twice a week on average, and most days during the summer school holidays. He and his friends did not use the Land itself. It was well known that the West Side was an area where dogs fouled. Since 1997, he has not walked past the Land. However, over the past five years, he has driven past the Land regularly on his way to and from work. He has only ever seen people using the footpaths, including school children as The Grove School was located nearby, and the footpath on the West Side was used by dog walkers to access the woodland area along Streamside Walk. Dogs ran around on the grassy areas, particularly on the West Side, whilst people walked on the paths. He has not observed any other use of the Land.

4.82 Mr [REDACTED] O [REDACTED]<sup>68</sup> lived at [REDACTED] Albourne Close from [REDACTED] until [REDACTED] and then at [REDACTED] Georgian Walk from [REDACTED] until [REDACTED], both within the neighbourhood. He did not know the Land prior to [REDACTED]. He and his family never used the Land. Between 1991 and 1998, he drove past the Land every working day and occasionally at weekends. Since 1998, he has only rarely driven past the Land. He has only ever walked past the Land occasionally; he has mainly driven past it. He has never seen

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<sup>66</sup> His witness statement is at OB4 page 982.

<sup>67</sup> His witness statement is at OB3 page 654.

<sup>68</sup> His witness statement is at OB3 page 825.

anyone using the Land apart from the footpaths, and no recreational activities were carried out on the Land.

4.83 Mr ██████ H ██████<sup>69</sup> has worked for The Park Lane Group since October ██████ as Construction Manager, and since ██████ it has been as a self-employed part time consultant. He was unaware of the Land before October 2006. Prior to the Application being made, he visited the Land on about ten occasions, all on weekdays in working hours and always within daylight hours. The visits were about 20 to 30 minutes in length. The purposes for them were varied, but he was involved in looking at the Land from a technical point of view, such as its drainage, as it was a challenging site. There was no indication at that time that a town or village green application was to be made. The Land was steeply sloping and uneven and it was necessary to look where you put your feet when walking on it. He referred to photographs he had taken. None of the photographs show anyone using the Land, and he did not see anyone on the Land during his visits save for people using the footpaths. There was nothing on the Land that suggested to him that people were using it for lawful sports and pastimes. There was no evidence of any well worn paths across the Land or of any worn areas where children had played or of the long grass being trodden down or of dog fouling. Had he seen any activity on the Land, he would have reported it back to Mr B ██████. It was never fenced before May 2009 because there was no need to do so given that there was no indication that the Land was being used. In October 2008, he contacted the Borough Council when he was alerted to the fact that the Land was being cut by someone other than The Park Lane Group, and was informed that the grass was being cut by the Council as it was understood to be Crown Land, but it then stopped at his request and The Park Lane Group now has its own mowing regime for the Land. He has also occasionally driven past the Land. He has never seen anyone using the Land apart from the footpaths, and has never seen any recreational activities on the Land.

4.84 Mr ██████ C ██████<sup>70</sup> lived in Celandine Drive between ██████ and ██████. He is a Company Director of a local Estate Agency. Whilst living at Celandine Drive, he drove or walked past the Land frequently each week. During the course of his work appointments, he has and continues to drive past the Land. He has never used the Land and he has only seen people using the footpaths across the Land. He could not recall how frequently he had seen people using the footpaths, but they were particularly well used by school children. He has never seen anyone on the grassed areas.

4.85 Mr ██████ D ██████<sup>71</sup> lived at ██████ Douce Grove, which is within the neighbourhood, from the age of ██████ until ██████ when he was ██████. He then moved to Bexhill on Sea, but moved back to ██████ Douce Grove in ██████. As a self-employed Carpenter, he has done work for The Park Lane Group. He has known the Land all his life. During his childhood, he used the footpath on both sides of the Land, but did not recall ever seeing anyone on the grassy areas and he did not use them. People used the footpath to walk their dogs, but there were no activities carried out on any other part of the Land. Children did not play on it as it was too steep to play ball games on, such as football or cricket, and in his view it was too dangerous to sledge

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<sup>69</sup> His witness statement is at OB3 page 762.

<sup>70</sup> His witness statement is at OB3 page 720.

<sup>71</sup> His witness statement is at OB3 page 724.

on given that the East Side sloped into Fern Road whilst the West Side sloped into brambles. As a child, he played in the field at Celandine Drive which many children and dog walkers used. Occasionally, he went to the South Saxons playing field to play football. When he was at West St Leonards Primary School, he was driven past the Land and did not recall anyone being on the Land. He then attended The Grove Secondary School, and after school he often walked along the footpath on the West Side. He never saw anyone on the Land on those occasions. He did a paper round at the age of ■ for some three years between ■ and ■ five days a week when he delivered to houses along the western side of Fern Road near to the Land early in the morning and then went up to the estate where he lived, but he never saw anyone on the Land. He would have been on Fern Road for five or six minutes whilst doing his paper round. He saw dog walkers on the footpaths and pavements. Some of them let their dogs off the lead to go on to the grass whilst they stayed on the paths. He recalled that some dog owners drove to the Land, parked on Fern Road and allowed their dogs to run on the West Side whilst they stood on the pavement. That was a regular occurrence which he saw happen at least once a week. He expressed the view that if a survey did not include early in the morning, it would be missing something. Apart from the time he lived in Bexhill when he drove past the Land around once a month, he has passed the Land several times a week, including at weekends. He has never seen anyone on the Land apart from on the footpaths, and he has never seen any recreational activities on the Land, such as sports being played, picnicking or tobogganing. In his view, the claimed neighbourhood did properly represent a neighbourhood as it was between main roads, but there was nothing otherwise to distinguish it.

4.86 Mr ■ R ■<sup>72</sup> is self-employed and has undertaken general maintenance work for The Park Lane Group for the past eight years as a maintenance contractor. He was engaged by that Company to undertake a photographic survey of the Land between March and April 2009 for which he was paid. He was not made aware of the reasons for the photographic survey. He was instructed by S ■ B ■ to take one photograph of each side of the Land once within every hour during daylight hours, and to take a photograph of any activity in the area, whether on the grass, the footpaths or the footways. He took such photographs about four days per week, both during the week and at weekends, and took the bulk of the photographs for the survey which he referred to. He tried to take as much of the Land as he could in the photographs. He acknowledged that he had no professional experience in taking photographs, that the camera he used was not particularly good and that mistakes were made, such as he did not appear to have always taken a photograph of both sides of the Land and he did not appear to have continued to take photographs to the end of daylight hours on each day. Further, he was unable to explain apparent discrepancies in the times given for when some of the photographs were taken, or why some of the photographs appeared to be identical but with different times given for when they were taken. He was on site around five to ten minutes to take each set of photographs, and took most of them from his car. He then returned the camera to the office the next morning where Sa ■ W ■ immediately uploaded the photographs onto a computer and asked him about the weather conditions and what he had seen. He indicated that he had not seen his photographs again until giving evidence to the Inquiry, although he stated that he had probably seen them when he signed his witness

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<sup>72</sup> His witness statement is at OB4 page 907.

statement. As to the lack of any school children shown on the photographs, he acknowledged that he only noticed that after he had taken them and questioned whether they were taken during term time.

4.87 In addition, he has regularly driven past the Land since he took the photographs in 2009 twice a week on Tuesday and Thursday mornings. On all the occasions he has been at the site to take the photographs or driven past, he has only seen people using the footpaths. In the main, they are school children heading towards Marlborough Close. He has also seen a dog walker on the footpath. He has not observed anyone using the grass areas.

4.88 Mr [REDACTED] B [REDACTED]<sup>73</sup> is a Director of Park Lane Developments Limited, previously known as Streamside Properties Limited. In 1988, he set up the business now known as The Park Lane Group of companies and he is the sole Managing Director of that Group.

4.89 His first knowledge of the Land was in the mid-1980's when he occasionally drove past it. He then worked for an estate agency business when he was aware of the Land as it was under their radar as a possible development site at that time. He recalled people using the footpath across the Land at that time, but not using the grassed area. If the Land was being used by walkers, dog walkers and for other recreational activities, that would have raised alarm bells as to its future development. In [REDACTED] until [REDACTED], he lived at [REDACTED] Georgian Walk which is within the neighbourhood. He never used the Land and he did not recall others using it save for the footpath. He drove past the Land daily during that period at various times. In 1995, he started making enquiries into acquiring the Land for development, and was aware that it was then owned by the Crown. He had seen no references to the Land being held as public open space. It is a heavily sloping site which had suffered slippage which he was keen to monitor. From around 1996 onwards, he walked over the Land on both sides about three or four times a month to look over it, at various times during daylight hours including at weekends. During all the times he visited the Land, he did not see anyone on it apart from on the footpaths. He never noticed the darker green grass running diagonally across the southern part of the East Side. Had he been concerned about prescriptive rights being acquired through usage, he would have reconsidered whether to acquire it. Although he never knew about town and village greens until January 2009, he was aware of prescriptive rights and possessory rights capable of being acquired. Moreover, he would have taken immediate action to cease any such use, namely by fencing the Land, and would have considered the resulting insurance risks. However, at no point was he concerned about the Land being used for any purpose other than the footpath use and there was nothing to indicate that it was being otherwise used. In November 2005, his Company acquired part of the Land. Subsequently, he has continued to inspect the Land frequently for purposes such as site investigations, site surveys and stability issues. He has still seen no one on the Land save the footpaths and has seen no recreational activities on the Land. He referred to photographs he took of the Land in September 2006 during one of his visits.

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<sup>73</sup> His witness statement is at OB3 page 641.

4.90 As to the photographic survey, he noted that it had escalated into a pivotal piece of evidence that was never intended. When he became aware of the Application, he merely instructed the survey to be undertaken to ascertain whether the alleged usage was in fact taking place on the Land. It was a loose instruction given to S [REDACTED] B [REDACTED], and not a formal one, to take photographs every hour of each side of the Land in order to inform himself of any usage of the Land rather than to obtain evidence. He made a positive request for any activity seen to be caught on the photographs. If someone was on the Land, he wanted a photograph taken of that activity as he wished to know what activity was in fact taking place on the Land. He wanted the survey to include the Easter Bank Holiday Weekend. There was no strict methodology involved and no notes were kept. It took place over 43 days. There was no instruction or information provided by him that the photographs were being taken in order to defend a town or village green application. However, when it became apparent from the photographs that there was not the alleged usage, it was decided to put them forward as evidence as an extremely good record of use at that time, albeit after the Application had been made. He did not accept there were serious problems and errors with that survey. Only a minor handful, namely six out of the 954 photographs taken, had been identified as having a concern. The vast majority of the photographs taken reflect the position in the area at the time they were taken, which was shortly after the Application was made. He expressed the view that they indicated that the Land was not being used as claimed in the Application. Moreover, he pointed out that all the photographic evidence produced was consistent as to the level of usage of the Land. The survey was completed in April 2009 and the Land was then fenced in May 2009. He had been made aware that such fencing would stop the clock ticking, and would also prevent a second application being made. He acknowledged that no user survey had been undertaken by the Objectors.

4.91 Mr [REDACTED] P [REDACTED]<sup>74</sup> is a Chartered Town Planner with over 30 years experience and is a member of the Royal Town Planning Institute. He was initially instructed by The Park Lane Group on 14 January 2009 in relation to a planning application for the residential development of the East Side, but subsequently by the Objectors to assist in making representations to the Registration Authority in response to the Application.

4.92 The Land is in the ownership of four separate owners as shown on the ownership map,<sup>75</sup> three of whom are the Objectors. The area shown as being owned by Streamside Properties Limited is now in the ownership of The Park Lane Group. The fourth owner is Hastings Borough Council, which owns the western part of the West Side and a small strip on the northern part of the East Side and manages and maintains those areas as public open space.<sup>76</sup> The Land was fenced off on 11 May 2009 and has remained fenced since that date.

4.93 The Land was previously part of a larger area owned by the former County Borough of Hastings. Part of that larger area, including the Application Land apart from those areas owned by the Borough Council, was then sold for housing development in 1960 to a house building company. In 1966, planning permission was obtained to erect 10 detached dwellings and garages on the eastern part of that land,

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<sup>74</sup> His witness statement is at OB4 page 1149.

<sup>75</sup> Appendix 1 to the Objection Statement at OB1 page 42.

<sup>76</sup> Appendix 36 to Objector's Further Submissions Statement at OB2 page 534.

which included 8 dwellings on the East Side, and further planning permission was granted to erect 6 detached dwellings and garages on the western part, including 4 dwellings on the West Side. Both planning permissions were implemented, but neither development was completed, and the Land remained undeveloped. In 1987, the house building company was dissolved and the Land accordingly passed to the Crown. The Land was purchased privately in November 2005. The purpose for which the Land was held by the Crown between 1987 and 2005 is unknown. It appears to have been maintained by the Borough Council throughout that period until November 2008 for visual amenity reasons following complaints over its condition from local residents. After the Land's purchase in November 2005, consultants were appointed to undertake geotechnical works, and a geotechnical report was produced in March 2006 which included various photographs of the Land.<sup>77</sup> A ground investigation report including photographs was produced in December 2007.<sup>78</sup> On 31 October 2007, a Certificate of Lawfulness was obtained from the Borough Council confirming that the planning permission for the residential development of the East Side remained extant, and on 18 April 2008, a Certificate of Lawfulness was granted in relation to the residential development of the West Side.<sup>79</sup> Subsequently, on 5 November 2008, a full planning application was submitted for the erection of 14 semi-detached dwellings on the East Side in place of the 8 detached dwellings approved but not built. The application was refused by the Borough Council, but granted on appeal on 1 December 2011.<sup>80</sup>

4.94 In relation to the claimed neighbourhood, it comprises approximately 910 dwellings. Other than a small parade of shops in Fernside Avenue, which do not merely serve the neighbourhood, the neighbourhood has no community facilities such as a school, community hall, public house or church. He referred to local facilities in the wider area which had been plotted on a map and were all outside the identified neighbourhood.<sup>81</sup> He expressed the view that the claimed neighbourhood was merely a random grouping of residential streets. As indicated on the Objectors' schedule of dwellings within the neighbourhood,<sup>82</sup> it comprises dwellings of different ages, with some being built post 1989, and different styles and dwelling types, including detached, semi-detached, bungalows, flats and terraces, with no common architectural style. He disagreed that it all had a spacious character as it included more densely developed areas. He was not aware of any social cohesion in the neighbourhood. He also questioned the selected boundaries of the neighbourhood, some of which cut across individual houses and gardens. That was apparent from the plotting of the neighbourhood boundary on the Borough Plan's Proposals Map.<sup>83</sup> Further, there was no reason why some of the houses on Harley Shute Road should be within the neighbourhood and others outside it and in a different neighbourhood, and the position was the same in relation to Gillsman's Hill. Some of the questionnaires, statutory declarations and letters of support are from people living outside the neighbourhood. Moreover, there are entire streets in the neighbourhood where no households made any representations as shown on the schedule that had been

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<sup>77</sup> Extract is at Appendix 31 of Objectors' Response Statement at OB2 page 501.

<sup>78</sup> Extract is at Appendix 32 of Objectors' Response Statement at OB2 page 512.

<sup>79</sup> At Appendices 5 and 6 of Objectors' Statement at OB1 pages 55 and 58 respectively.

<sup>80</sup> OB10.

<sup>81</sup> OB11.

<sup>82</sup> OB9.

<sup>83</sup> Appendix 30 of Objectors' Response Statement at OB2 page 497.

prepared.<sup>84</sup> Responses have been made by only 14% of the households in the neighbourhood. That schedule also ranked the responses to identify from which streets the greatest number of responses was made from. Hence, most responses were from Fern Road, then Marlborough Close and then Gillsman's Park. The Objectors had also carried out an updated analysis of the evidence questionnaires which he referred to.<sup>85</sup>

4.95 He acknowledged that both blackberry picking and nature watching were capable of being a lawful sport and pastime, but in his view they were not on the evidence in this case.

### **Written Evidence Objecting to the Application**

4.96 In addition to the evidence of witnesses who appeared at the Inquiry, I have also considered and had regard to all the written evidence submitted in support of the objection to the Application in the form of additional witness statements and statutory declarations which are contained in the Objectors' Bundle. However, in relation to such written evidence, I refer to and repeat my observations in paragraph 4.46 above that whilst such written evidence must be taken into account, I and the Registration Authority must bear in mind that it has not been tested by cross examination. Hence, particularly where it is in conflict with any oral evidence given to the Inquiry, I have attributed such evidence less weight as it was not subject to cross examination.

### **THIRD PARTY EVIDENCE**

4.97 During the Inquiry, I invited any other persons who wished to give evidence to do so. One individual did so and the opportunity was provided for his evidence to be subject to cross examination.

4.98 Mr [REDACTED] H [REDACTED] has lived at [REDACTED] Harley Shute Road for [REDACTED] years and has no connection with either the Applicant or the Objectors. He has walked along Fern Road regularly, approximately once a week, and it is one of his running routes for training which he uses around twice a week. He crosses the Land via the footpaths. He did not run on the grassed areas as it was too dangerous. He has also driven past the Land in his car. He has never seen anyone playing ball games on the Land, and it is too steep and dangerous for such activities. He has seen dog walkers on the footpath, but not on the grass. He had not seen any blackberry picking on the Land, but could imagine that it would be done during the season. He has been tobogganing on the Land on one occasion with children, but he regarded it as dangerous. In his view, the Application has been made to deter development.

## **5. THE LEGAL FRAMEWORK**

5.1 I shall set out below the relevant basic legal framework within which I have to form my conclusions and the Registration Authority has to reach its decision. I shall then proceed to apply the legal position to the facts I find based on the evidence that has been adduced as set out above.

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<sup>84</sup> Appendix 29 of Objectors' Response Statement at OB2 page 493.

<sup>85</sup> Appendix 27 of Objectors' Response Statement at OB2 page 485.

### **Commons Act 2006**

5.2 The Application was made pursuant to the Commons Act 2006. That Act requires each registration authority to maintain a register of town and village greens within its area. Section 15 provides for the registration of land as a town or village green where the relevant statutory criteria are established in relation to such land.

5.3 The Application seeks the registration of the Land by virtue of the operation of section 15(2) of the 2006 Act. Under that provision, land is to be registered as a town or village green where:-

- “(a) *a significant number of the inhabitants of any locality, or of any neighbourhood within a locality, have indulged as of right in lawful sports and pastimes on the land for a period of at least 20 years; and*
- (b) *they continue to do so at the time of the application.*”

5.4 Therefore, for the Application to succeed, it must be established that:-

- (i) the Application Land comprises “land” within the meaning of the 2006 Act;
- (ii) the Land has been used for lawful sports and pastimes;
- (iii) such use has been for a period of not less than 20 years;
- (iv) such use has been by a significant number of the inhabitants of a locality or of a neighbourhood within a locality;
- (v) such use has been as of right; and
- (vi) such use continued at the time of the Application.

### **Burden and Standard of Proof**

5.5 The burden of proving that the Land has become a village green rests with the Applicant for registration. The standard of proof is the balance of probabilities. That is the approach I have used.

5.6 Further, when considering whether or not the Applicant has discharged the evidential burden of proving that the Land has become a town or village green, it is important to have regard to the guidance given by Lord Bingham in **R. v Sunderland City Council ex parte Beresford**<sup>86</sup> where, at paragraph 2, he noted as follows:-

*“As Pill LJ. rightly pointed out in R v Suffolk County Council ex parte Steed (1996) 75 P&CR 102, 111 “it is no trivial matter for a landowner to have land, whether in public or private ownership, registered as a town green ...”. It is accordingly necessary that all ingredients of this definition should be met before land is registered, and decision makers must consider carefully whether the land in question has been used by inhabitants of a locality for indulgence in what are properly to be regarded as lawful sports and pastimes and whether the temporal limit of 20 years’ indulgence or more is met.”*

Hence, all the elements required to establish that land has become a town or village green must be properly and strictly proved by an applicant on a balance of probabilities.

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<sup>86</sup> [2004] 1 AC 889.

## Statutory Criteria

5.7 Caselaw has provided helpful rulings and guidance on the various elements of the statutory criteria required to be established for land to be registered as a town or village green which I shall refer to below.

### Land

5.8 Any land that is registered as a village green must be clearly defined so that it is clear what area of land is subject to the rights that flow from village green registration.

5.9 However, it was stated by way of *obiter dictum* by the majority of the House of Lords in ***Oxfordshire County Council v. Oxford City Council***<sup>87</sup> that there is no requirement that a piece of land must have any particular characteristics consistent with the concept of a village green in order to be registered.

### Lawful Sports and Pastimes

5.10 It was made clear in ***R. v. Oxfordshire County Council ex parte Sunningwell Parish Council***<sup>88</sup> that “*lawful sports and pastimes*” is a composite expression and so it is sufficient for a use to be either a lawful sport or a lawful pastime. Moreover, it includes present day sports and pastimes and the activities can be informal in nature. Hence, it includes recreational walking, with or without dogs, and children’s play.

5.11 However, that element does not include walking of such a character as would give rise to a presumption of dedication as a public right of way. In ***R. (Laing Homes Limited) v. Buckinghamshire County Council***<sup>89</sup>, Sullivan J. (as he then was) noted at paragraph 102 that:-

*“it is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way – to walk, with or without dogs, around the perimeter of his fields – and use which would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields.”*

A similar point was emphasised at paragraph 108 in relation to footpath rights and recreational rights, namely:-

*“from the landowner’s point of view it may be very important to distinguish between the two rights. He may be content that local inhabitants should cross his land along a defined route, around the edge of his fields, but would vigorously resist if it appeared to him that a right to roam across the whole of his fields was being asserted.”*

5.12 More recently, Lightman J. stated at first instance in ***Oxfordshire County Council v. Oxford City Council***<sup>90</sup> at paragraph 102:-

*“Recreational walking upon a defined track may or may not appear to the owner as referable to the exercise of a public right of way or a right to enjoy a lawful sport or pastime depending upon the context in which the exercise takes*

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<sup>87</sup> [2006] 2 AC 674 per Lord Hoffmann at paragraphs 37 to 39.

<sup>88</sup> [2000] 1 AC 335 at 356F to 357E.

<sup>89</sup> [2003] EWHC 1578 (Admin).

<sup>90</sup> [2004] Ch. 253.

*place, which includes the character of the land and the season of the year. Use of a track merely as an access to a potential green will ordinarily be referable only to exercise of a public right of way to the green. But walking a dog, jogging or pushing a pram on a defined track which is situated on or traverses the potential green may be recreational use of land as a green and part of the total such recreational use, if the use in all the circumstances is such as to suggest to a reasonable landowner the exercise of a right to indulge in lawful sports and pastimes across the whole of his land. If the position is ambiguous, the inference should generally be drawn of exercise of the less onerous right (the public right of way) rather than the more onerous (the right to use as a green)."*

He went on in paragraph 103 to state:-

*"The critical question must be how the matter would have appeared to a reasonable landowner observing the user made of his land, and in particular whether the user of tracks would have appeared to be referable to use as a public footpath, user for recreational activities or both. Where the track has two distinct access points and the track leads from one to the other and the users merely use the track to get from one of the points to the other or where there is a track to a cul-de-sac leading to, e.g., an attractive view point, user confined to the track may readily be regarded as referable to user as a public highway alone. The situation is different if the users of the track, e.g., fly kites or veer off the track and play, or meander leisurely over and enjoy the land on either side. Such user is more particularly referable to use as a green. In summary it is necessary to look at the user as a whole and decide adopting a common-sense approach to what (if any claim) it is referable and whether it is sufficiently substantial and long standing to give rise to such right or rights."*

The Court of Appeal and the House of Lords declined to rule on the issue since it was so much a matter of fact in applying the statutory test. However, neither the Court of Appeal nor the House of Lords expressed any disagreement with the above views advanced by Lightman J.

### **Continuity and Sufficiency of Use over 20 Year Period**

5.13 The qualifying use for lawful sports and pastimes must be continuous throughout the relevant 20 year period: *Hollins v. Verney*.<sup>91</sup>

5.14 Further, the use has to be of such a nature and frequency as to show the landowner that a right is being asserted and it must be more than sporadic intrusion onto the land. It must give the landowner the appearance that rights of a continuous nature are being asserted. The fundamental issue is to assess how the matters would have appeared to the landowner: *R. (on the application of Lewis) v. Redcar and Cleveland Borough Council*.<sup>92</sup>

### **Locality or Neighbourhood within a Locality**

5.15 A "locality" must be a division of the County known to the law, such as a borough, parish or manor: *MoD v Wiltshire CC*;<sup>93</sup> *R. (on the application of*

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<sup>91</sup> (1884) 13 QBD 304.

<sup>92</sup> [2010] UKSC 11 at paragraph 36.

<sup>93</sup> [1995] 4 All ER 931 at page 937b-e.

*Cheltenham Builders Limited) v. South Gloucestershire DC*,<sup>94</sup> and *R. (Laing Homes Limited) v. Buckinghamshire CC*.<sup>95</sup> A locality cannot be created simply by drawing a line on a plan: *Cheltenham Builders* case.<sup>96</sup>

5.16 In contrast, a “neighbourhood” need not be a recognised administrative unit. Lord Hoffmann pointed out in *Oxfordshire County Council v. Oxford City Council*<sup>97</sup> that the statutory criteria of “any neighbourhood within a locality” is “obviously drafted with a deliberate imprecision which contrasts with the insistence of the old law upon a locality defined by legally significant boundaries”. Hence, a housing estate can be a neighbourhood: *R. (McAlpine) v. Staffordshire County Council*.<sup>98</sup> Nonetheless, a neighbourhood cannot be any area drawn on a map. Instead, it must be an area which has a sufficient degree of cohesiveness: *Cheltenham Builders* case.<sup>99</sup>

5.17 Further clarity was provided on that element recently by HHJ Waksman QC in *R. (Oxfordshire and Buckinghamshire Mental Health NHS Foundation Trust and Oxford Radcliffe Hospitals NHS Trust) v. Oxfordshire County Council*<sup>100</sup> who stated:-

“While Lord Hoffmann said that the expression was drafted with “deliberate imprecision”, that was to be contrasted with the locality whose boundaries had to be “legally significant”. See paragraph 27 of his judgment in *Oxfordshire* (supra). He was not there saying that a neighbourhood need have no boundaries at all. The factors to be considered when determining whether a purported neighbourhood qualifies are undoubtedly looser and more varied than those relating to locality... but, as Sullivan J stated in *R (Cheltenham Builders) Ltd v South Gloucestershire Council* [2004] JPL 975 at paragraph 85, a neighbourhood must have a sufficient degree of (pre-existing) cohesiveness. To qualify therefore, it must be capable of meaningful description in some way. This is now emphasised by the fact that under the Commons Registration (England) Regulations 2008 the entry on the register of a new TVG will specify the locality or neighbourhood referred to in the application.”

### Significant Number

5.18 “Significant” does not mean considerable or substantial. What matters is that the number of people using the land in question has to be sufficient to indicate that their use of the land signifies that it is in general use by the local community for informal recreation, rather than occasional use by individuals as trespassers: *R. (McAlpine) v. Staffordshire County Council*.<sup>101</sup>

### As of Right

5.19 Use of land “as of right” is a use without force, without secrecy and without permission, namely *nec vi nec clam nec precario*. It was made clear in *R. v.*

<sup>94</sup> [2003] EWHC 2803 (Admin) at paragraphs 72 to 84.

<sup>95</sup> [2003] EWHC 1578 (Admin) at paragraph 133.

<sup>96</sup> At paragraphs 41 to 48.

<sup>97</sup> [2006] 2 AC 674 at paragraph 27.

<sup>98</sup> [2002] EWHC 76 (Admin).

<sup>99</sup> At paragraph 85.

<sup>100</sup> [2010] EWHC 530 (Admin) at paragraph 79.

<sup>101</sup> [2002] EWHC 76 (Admin) at paragraph 71.

*Oxfordshire County Council ex parte Sunningwell Parish Council*<sup>102</sup> that the issue does not turn on the subjective intention, knowledge or belief of users of the land.

5.20 “Force” does not merely refer to physical force. User is *vi* and so not “*as of right*” if it involves climbing or breaking down fences or gates or if it is under protest from the landowner: *Newnham v. Willison*.<sup>103</sup> Further, Lord Rodger in *Lewis v. Redcar* stated that “*If the use continues despite the neighbour’s protests and attempts to interrupt it, it is treated as being vi...user is only peaceable (nec vi) if it is neither violent nor contentious*”.<sup>104</sup>

5.21 “Permission” can be expressly given or be implied from the landowner’s conduct, but it cannot be implied from the mere inaction or acts of encouragement of the landowner: *R. v. Sunderland City Council ex parte Beresford*.<sup>105</sup>

## **6. APPLICATION OF THE LAW TO THE FACTS**

### **Approach to the Evidence**

6.1 The impression which I obtained of all the witnesses called at the Inquiry is that they were entirely honest and transparent witnesses, and I therefore accept for the most part the evidence of all the witnesses called for each of the Parties.

6.2 I have considered all the evidence put before the Inquiry, both orally and in writing. However, I emphasise that my findings and recommendations are based upon whether the Land should be registered as a town or village green by virtue of the relevant statutory criteria being satisfied. In determining that issue, it is inappropriate for me or the Registration Authority to take into account the merits of the Land being registered as a town or village green or of it not being so registered.

6.3 I shall now consider each of the elements of the relevant statutory criteria in turn as set out in paragraph 5.4 above, and determine whether they have been established on the basis of all the evidence, applying the facts to the legal framework set out above. The facts I refer to below are all based upon the evidence set out in detail above. In order for the Land to be registered as a town or village green, each of the relevant statutory criteria must be established by the Applicant on the evidence adduced on the balance of probabilities.

### **The Land**

6.4 There is no difficulty in identifying the relevant land sought to be registered. Map (A) submitted with the Application shows the Land outlined in red and is the definitive document on which the Land that is the subject of the Application is marked. The Land has clearly defined and fixed boundaries, and there was no dispute at the Inquiry nor in any of the evidence adduced that that area of land comprises “land” within the meaning of section 15(2) of the 2006 Act and is capable of registration as a town or village green in principle and I so find.

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<sup>102</sup> [2000] 1 AC 335.

<sup>103</sup> (1988) 56 P. & C.R. 8.

<sup>104</sup> At paragraphs 88-90.

<sup>105</sup> [2004] 1 AC 889.

### **Relevant 20 Year Period**

6.5 Turning next to the identification of the relevant 20 year period for the purposes of section 15(2) of the 2006 Act, the use must continue up until the date of the Application. Hence, the relevant 20 year period is the period of 20 years which ends at the date of the Application.

6.6 The Application Form and the accompanying statutory declaration are dated 21 January 2009, and the Application was received by the Registration Authority on 23 January 2009. In my view, the relevant date of the Application is the date when the Application is received by the Registration Authority. I further note that that was the agreed view expressed on behalf of both the Applicant<sup>106</sup> and the Objectors.<sup>107</sup> It follows that the relevant 20 year period for the purposes of section 15(2) is 23 January 1989 until 23 January 2009.

### **Use of Land for Lawful Sports and Pastimes**

6.7 As to the use of the Land for lawful sports and pastimes, it is contended by the Applicant that the Land has been used for various recreational activities. In particular, references were made in both the oral and the written evidence to dog walking, general walking, blackberry picking, tobogganing, ball games, children's play, picnicking, kite flying and nature watching. There was no evidence of any formal or organised events having taken place on the Land, but informal activities are sufficient in principle to establish town or village green rights. All those activities referred to are, in my opinion, lawful activities, and there was no suggestion to the contrary. Instead, the fundamental issues raised were whether those activities have in fact taken place on the Land and, if so, whether they were carried out to a sufficient extent and degree to enable town or village green rights to be established over the Land.

6.8 Starting with the former, I heard from a number of witnesses in support of the Application who gave evidence as to their personal and their family's recreational use of the Land. The periods of their use, frequency of their use and the activities they carried out varied. Although I take into account that it is difficult to recall the details of such uses over lengthy periods of time, I have no reason to doubt that those activities did in fact take place by the individual witnesses, whose evidence I accept in that regard. Their evidence is supported by the extensive written evidence of others claiming to have carried out similar activities on the Land.

6.9 In so finding, I note the Objectors' evidence to the contrary. A number of witnesses in support of the Objection noted that they had never seen any such recreational activities on the Land, and again, I have no reason to doubt their evidence which I accept in that regard. However, it seems to me that the apparent discrepancy in the evidence on that issue is explained by two principle points.

6.10 Firstly, those witnesses were not in the vicinity of the Land throughout daylight hours all day every day. Instead, they visited the Land for various reasons, drove past the Land or walked past the Land, with varying degrees of frequency. As Mr S ■■■ B ■■■ fairly acknowledged, and which I concur with, people may have used the Land when he was not present and at times when the photographs for the

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<sup>106</sup> Closing Submissions at paragraph 1.

<sup>107</sup> Confirmed orally on behalf of the Objectors.

photographic survey were not being taken. That view was also repeated by Miss W [REDACTED], whom I found also to be an entirely honest and fair witness, who acknowledged that each photograph taken for the photographic survey was only a snapshot in time and she was unable to say that people did not use the Land when she was not present. Those who gave evidence as to their recollections of the use of the Land when driving past would have been in the vicinity for only a matter of seconds, and even those who attended for other purposes were generally in the vicinity for only limited periods of time. Having said that, I acknowledge the extent of those attendances and the number of photographs taken which I shall return to below in the context of the issue of the extent of the user.

6.11 Secondly, the main use of the Land appears from the evidence in support of the Application to have been for dog walking. That is not a particularly noticeable activity in contrast to, for example, a game of football or game of cricket being played. As Mr B [REDACTED] B [REDACTED] noted, he would not have particularly noticed dog walking on the Land, but he would have noticed formal or informal sports taking place. Given also the size of the Land and that it is split across both sides of Fern Road, such an activity could relatively easily have gone unnoticed on individual visits, and certainly by those driving past. That is particularly so given that, as the various Objectors' witnesses again fairly acknowledged, they were not focused on the use being made of the Land which they were not monitoring, save of course in relation to the photographic survey which I return to further below.

6.12 Moreover, I note that some of the Objectors' witnesses had themselves seen some, albeit limited, recreational activities on the Land. Mr W [REDACTED] had seen some occasional use of the West Side by dog walkers and a short cut use being made of the southern part of the East Side diagonally between the footpath and 14 Fern Road. Similarly, Mr O [REDACTED], a local resident in the claimed neighbourhood throughout the relevant 20 year period, pointed out that he sometimes saw people walking on the grass on the West Side, although the majority stayed on the footpath; he had seen occasional blackberry picking on the West Side; and during periods of sufficient snow, the East Side became "*a hive of activity*" for tobogganing. Mrs P [REDACTED] also recalled tobogganing on the Land on rare occasions when it snowed. During the photographic survey, Mr C [REDACTED] saw a dog walker taking a short cut across the grass on the southern part of the East Side. Another local resident from the neighbourhood, Mr R [REDACTED], occasionally saw people walking across the East Side to take a diagonal short cut, and accepted that dog walkers could have taken a short cut across the West Side but he had not noticed it. He had also witnessed tobogganing on the Land. Such evidence further supports my view that some recreational activities have taken place on the Land.

6.13 I further take into account the location and accessibility of the Land. It comprises two areas of grassland within a residential area across each of which there is a footpath and which has always been open to access until it was fenced in May 2009. I return to its suitability for other recreational activities below, but it seems to me, having seen the Land, that it is a relatively suitable and easily accessible area for local dog walking and for exercising a dog. Indeed, that view was expressed by some of the Objectors' witnesses, including Mrs G [REDACTED] who stated that the Land would be suitable for dog walking, and Mr O [REDACTED] who pointed out that it could be used for dog walking. Some use of the Land by dog walkers is also consistent with Mr

B■■■■'s evidence that it was well known in the local area that the West Side was an area where dogs fouled and Mrs P■■■■'s evidence that she assumed that the Land was used by dogs to exercise and to foul.

6.14 Considering all the evidence in its entirety, it is my opinion that the Land has been used for some lawful sports and pastimes during the relevant 20 year period, and I so find.

#### **Sufficiency of User of Land for Lawful Sports and Pastimes**

6.15 The next and very significant issue, and the one to which the majority of the evidence at the Inquiry related, is whether there has been a sufficiency of user throughout the relevant 20 year period to establish town or village green rights over the Land.

6.16 As noted in paragraph 5.14 above, in order for that element of the statutory criteria to be established, the Land must have been used for qualifying lawful sports and pastimes to such an extent and with such a degree of frequency throughout the relevant 20 year period to show the landowner that rights were being asserted. It is insufficient for the qualifying use to have been merely sporadic or occasional in nature.

6.17 In identifying the qualifying use, it is necessary to discount from it certain of the activities relied upon in support of the Application. Firstly, and particularly significantly in this case, walking on the Land which was of such a character as would be more akin to the exercise of a public right of way must be discounted. I have set out the detailed legal position on that issue in paragraphs 5.11 and 5.12 above. In my view, that principle has considerable implications for the Application.

6.18 Each part of the Land, namely the East Side and the West Side, is crossed by a definitive public footpath. Walking along those footpaths, whether with or without a dog, and for recreational purposes or otherwise, amounts to the exercise of a public right of way. Such use cannot be relied upon in support of a town or village green, nor did the Applicant suggest otherwise. However, that point is of particular note for the following reason.

6.19 Although the evidence was somewhat contradictory, I find that those footpaths were and continue to be relatively well used. A number of witnesses suggested that they were not particularly well used, and I acknowledge that the issue is ultimately a subjective one, but those who were most familiar with the area suggested otherwise, and I prefer their evidence on that point. Hence, Mrs B■■■■, whom I found to be a particularly reliable witness with considerable personal knowledge of the area, stated that the footpath was very well used, especially by school children. That was supported by Mr W■■■■, a local resident until 2001 and who had worked as a postman in the area, who had used the footpaths himself daily; by Mrs P■■■■, a local resident from 1993 until 2011; and by Mr C■■■■, a local resident between 1994 and 2003, who regarded the footpaths as particularly well used by school children. Indeed, given that they are hard surfaced paths in a residential area with steps on the footpath on the East Side, which footpath leads to the local school and to Marlborough Close, whilst the footpath on the West Side leads to the wooded area, it would be surprising if they were not used relatively frequently. The particular relevance of that point to

the identification of the qualifying use is that although the witnesses who gave oral evidence in support of the Application distinguished between their use of the footpaths and of the grassed areas, the written evidence in support of the Application does not do so. It is unclear from the evidence questionnaires whether the identified uses of the Land of walking and exercising a dog that are referred to involved walking on the footpaths or on the grass areas or both. Given the extent of the use of the footpaths and given where the burden of proof lies, I cannot assume that those references merely relate to the use of the grass areas.

6.20 Furthermore, it seems to me that a number of other uses of the Land were more akin to the exercise of a right of way than the exercise of recreational lawful sports and pastimes over a village green. In relation to walking, both with and without dogs, a number of witnesses in support of the Application referred to walking along specific routes rather than recreating over the Land generally. Hence, by way of example, on the northern part of the East Side, the Applicant pointed out that dog walkers tended to follow a route round the periphery; Mrs W [REDACTED] stated that she walked along the edge of the brambles in that area, as she saw others do; Mr S [REDACTED] walked along its eastern edge; and Mr J [REDACTED] O [REDACTED] referred to the well worn path along the very edge of the brambles at the top of the hill which he walked his dogs on as did other dog walkers. Moreover, I take into account that in that northern area, the grass was allowed to grow long for a number of years when its conservation value was recognised. Mrs R [REDACTED] referred to it being kept long between May and September each year for a number of years with a one metre border being cut around it. She never saw anyone using the area of the long grass, and there was no evidence that the grass was trampled. That again suggests that that area was not recreated over generally. On the southern part of the East Side, numerous references were made to the diagonal short cut route used across the grass from the top of the steps to 14 Fern Road, and indeed, that route became apparent on the ground. However, in my view, walking along that particular route would be more akin to the exercise of a right of way than a recreational right over a village green. Similarly, by way of example on the West Side, Mrs G [REDACTED], clearly a regular dog walker in the area over many years, walked along its boundaries along the edge of the brambles where there were interesting smells for her dogs; Mrs H [REDACTED] took a similar route as her dog went straight to the brambles; and Mr B [REDACTED] predominantly walked around its perimeter. Although there are no other definitive rights of way over the Land other than the two paved footpaths, it is my view that walking around the perimeter of the Land or across a specific route would amount to a use that was more akin to the exercise of a public right of way than a recreational right over a green. Indeed, that seems to me to be the very use Sullivan J. was referring to in *Laing Homes* when he noted at paragraph 102 that:-

*“it is important to distinguish between use which would suggest to a reasonable landowner that the users believed they were exercising a public right of way – to walk, with or without dogs, around the perimeter of his fields – and use which would suggest to such a landowner that the users believed that they were exercising a right to indulge in lawful sports and pastimes across the whole of his fields.”*(my emphasis)

and at paragraph 108 that:-

*“from the landowner's point of view it may be very important to distinguish between the two rights. He may be content that local inhabitants should cross his land along a defined route, around the edge of his fields, but would*

*vigorously resist if it appeared to him that a right to roam across the whole of his fields was being asserted.” (my emphasis).*

Although I acknowledge that others used the Land more generally, I find from the evidence I heard that a material amount of the use of the Land for walking and dog walking was more akin to the exercise of a right of way than the exercise of recreational rights over a village green and such use must be discounted from the qualifying use.

6.21 I also take note of the fact that there is nothing in the evidence questionnaires which enables me to ascertain the extent to which the uses of the Land comprising walking and exercising dogs were otherwise than walking along specific routes. I am unable to make the assumption that such uses involved recreating over the Land generally in each case, and so I am unable to attribute any significant weight to that written evidence in relation to the specific uses of the Land for walking and dog walking.

6.22 Finally in relation to that issue, the use of the Land for exercising dogs where such use merely involved the owners walking on the footways along Fern Road and/or the footpaths across the Land and/or along other specific routes across the Land whilst their dogs ran over it must be discounted, in contrast to where owners themselves went onto the grassy areas to exercise their dogs. Sullivan J. noted in *Laing Homes* at paragraph 103 in relation to dog walking that:-

*“Once let off the lead a dog may well roam freely whilst its owner remains on the footpath. The dog is trespassing, but would it be reasonable to expect the landowner to object on the basis that the dog’s owner was apparently asserting the existence of some broader public right, in addition to his right to walk on the footpath?”*

In relation to a dog owner straying off a footpath to retrieve his dog, he stated at paragraph 104:-

*“I do not consider that the dog’s wanderings or the owner’s attempts to retrieve his errant dog would suggest to the reasonable landowner that the dog walker believed he was exercising a public right to use the land beyond the footpath for informal recreation.”*

He also indicated that *“the same would apply to walkers who casually or accidentally strayed from the footpaths without a deliberate intention to go on other parts of the fields”*. In that regard, although there was evidence of some dog owners going onto the Land to exercise their dogs, the evidence indicated that some merely let their dogs off the lead and allowed them to run on the Land while they stayed on the paths. Hence, Mr S ■■■ noted that when the weather was bad or he was in a hurry, he remained on the footway while his dog ran on the Land herself; Mr O ■■■ referred to using the footpath on the West Side whilst his dog ran round on the grass; Mrs P ■■■ pointed out that dogs would be let loose on the grass area whilst their owner stayed on the footpath across the Land; Mr P ■■■ stated that people walked along the footways with their dogs on extended leads which went onto the grassy areas; and Mr D ■■■ specifically recalled regularly seeing people when he was doing his paper round driving to the Land and letting their dogs off the lead to run on the Land whilst they stayed on the pavement.

6.23 In addition to the above, it is necessary to discount those uses of the Land by people who were not inhabitants of the neighbourhood at the time of their use of the Land. Thus, the written evidence from those who were not such inhabitants cannot be regarded as part of the qualifying use. Further, in relation to the oral evidence, and again taking into account the burden of proof on the Applicant, I discount the use by those who lived outside the neighbourhood or by those where there was no evidence that they were inhabitants of the neighbourhood. Thus, it was not established in relation to many of those who used the Land for tobogganing that they were from the neighbourhood, and use of the Land by visitors who did not themselves live in the area, including grandchildren, cannot be taken into account save in respect of the inhabitants' own personal use of the Land at those times.

6.24 Having discounted such uses, it is then necessary to assess the extent of the qualifying use.

6.25 In doing so, I find from the evidence in support of the Application that the primary use of the Land was for dog walking. That use was the most common activity referred to as being carried out on the Land by various witnesses. Further, I note the Applicant's submission that his case "*has always been that the most common and regular recreational use of the land is by dog walkers and that the area is ideal for this. Of the 18 witnesses who gave oral evidence for the Applicant, 15 were dog walkers.*"<sup>108</sup> In addition, I take into account that the Land was suitable for such an activity.

6.26 Nonetheless, my impression from the evidence was that the Land's use for dog walking was not considerable but, rather, was relatively low key. Mrs G [REDACTED] pointed out that when she walked her dogs on the Land, it varied whether she would see other dog owners there, whilst Mrs B [REDACTED] stated that she did not always see others using the Land when she was walking her dogs there. Further, I take into account that there were other areas of open space in the vicinity available for dog walking during the relevant 20 year period. They included, in particular, the nearby field at Celandine Drive, which was available until 2005 when it was developed. It appeared that it was more appealing to some inhabitants from the locality than the Application Land, but not to others, dependent upon the individual, their dog and where they lived. The Applicant fairly pointed out that that area was less accessible to some from the neighbourhood, but more easily accessible to others. Mrs B [REDACTED] used to walk her dog on that land frequently, as did Mrs B [REDACTED] and Mrs G [REDACTED] who pointed out that the Land "*became more precious*" once that land was no longer available.

6.27 In addition, I have taken into account the Objectors' evidence in relation to the extent of the use of the Land. In terms of the photographic survey, I have had regard to the Applicant's criticisms of that survey. It was not carried out formally in any particularly structured way, and it is apparent that mistakes were made as acknowledged in the evidence. In those circumstances, I do not regard that survey as in any way conclusive, and I note from Mr B [REDACTED]'s evidence that it was never intended to be. Moreover, photographs can only ever be a snapshot of the position at the time when they were taken. Nonetheless, bearing in mind the sheer number of photographs taken, including over the Easter Bank Holiday weekend after the

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<sup>108</sup> Paragraph 32 of Applicant's Closing Submissions.

Application had been made, that there was no suggestion by the Applicant that any of the individual photographers sought to mislead, the lack of activity shown in the area generally in the photographs, and the absence of any explanation as to the lack of activity at those particular times when the photographs were taken other than such reflected the general position at that time, I find that those photographs support a finding that the use of the Land was not particularly substantial. Similarly, such a finding is supported by the lack of use of the Land seen by the witnesses in support of the Objection generally. Although I give little weight to the evidence of people when they merely drove past the Land, as in my view they would have driven past the Land in a matter of seconds, would be focused on the road and not on the Land and would have no reason to take note of activity on the Land, I do attribute material weight to the evidence of a number of different witnesses who attended the Land at different times and saw no evidence of any activity on the Land apart from on the footpaths. I take into account that they would not be focused on whether the Land was in use and that individually they were in the vicinity for a short period of time. Nonetheless, had the use been substantial, it seems to me that at least one or two of them would have been alerted to that fact. I note in particular the evidence of Mr B [REDACTED] in that regard. Although he clearly has a financial interest in the outcome of this Application, as he accepted, it is my view that someone in his position, experienced in property development, would not have proceeded to acquire the Land, and to have taken no action whatsoever, had he been made aware of any material use of the Land by the public. Instead, his lack of action until 2009 supports his evidence that he was previously wholly aware of any indication of any public use of the Land despite his visits to the Land.

6.28 Consequently, taking all the evidence into account, I find that the use of the Land for dog walking was relatively modest. Given my finding that a material amount of such use was more referable to the exercise of a public right of way than a recreational use over a village green and so must be discounted, it is my view that the remaining qualifying use of the Land for dog walking, which was the acknowledged primary use of the Land, was no more than occasional by individual users.

6.29 It is necessary to go on to consider whether the additional activities carried out on the Land, together with the qualifying dog walking use, were nonetheless cumulatively of such a nature that they would have demonstrated to a reasonable landowner that recreational rights were being asserted over the Land.

6.30 As to blackberry picking, I accept the evidence of the witnesses in support of the Application who carried out such an activity on the Land. I saw brambles on both sides of the Land during my site visit, and I note that Mr O [REDACTED] who gave evidence on behalf of the Objectors confirmed that such a use took place on the Land. It was suggested on behalf of the Objectors, although not rigorously pursued, that blackberry picking was not capable of being a lawful sport and pastime. Insofar as that contention was maintained, I reject it. I am not aware of any general right to pick blackberries from privately owned land, and no authority to that effect was provided, and such an activity is in my opinion a lawful pastime in principle. Therefore, I find that blackberry picking is a lawful sport and pastime. Nonetheless, it is a seasonal activity, and therefore its occurrence on the Land would necessarily have only been during limited periods.

6.31 I also accept that tobogganing took place on the Land as stated by a number of witnesses in support of the Application and, indeed, as confirmed by a number of witnesses who gave evidence in support of the Objection. Moreover, I have seen photographs of such use of the Land. Nonetheless, again, it is necessarily a seasonal activity which only took place in particularly snowy conditions. The Applicant referred to such conditions having occurred on nine occasions over the relevant 20 year period spanning a few days.<sup>109</sup> Further, I note that there was no evidence as to whether many of the users at those times were from the neighbourhood. Therefore, its addition to the qualifying use is relatively limited.

6.32 As to children's games on the Land, the evidence of such use is relatively limited. In terms of the oral evidence, the Applicant referred to his Children playing on the Land when they were young, which did not include the latter part of the relevant 20 year period; Mrs W [REDACTED] noted that her Children used the Land until 1994; Mr B [REDACTED] stated that he used the Land to play with his Children from 1999, the only oral evidence of such use by inhabitants of the neighbourhood within the latter part of the relevant 20 year period, but gave no indication as to the frequency of such use; Mrs H [REDACTED]'s youngest Child played on the Land until 1990; whilst Mr S [REDACTED] used the Land with his Children until 1993 as did Mr O [REDACTED]. A number of the written questionnaires refer to children's play, but with no indication as to the period or frequency of such use. Others referred to children playing on the Land, but were unaware whether they were inhabitants of the neighbourhood, whilst others had children who played on the Land but outside the relevant 20 year period, and I am therefore unable to take such uses into account as part of the qualifying use.

6.33 As against the evidence in support of the Application on that issue, I again note the numerous photographs taken by the Objectors, both as part of the photographic survey and for unrelated purposes, and the number of visits to the Land by different people at different times, and yet none of the photographs and none of the visits revealed any activity on the Land. Children playing on the Land would typically be a more noticeable activity than dog walking, but there was not one sighting of such an activity. I also bear in mind the evidence of Mr B [REDACTED] B [REDACTED] and of Mr H [REDACTED] that when they separately visited the Land in the latter few years of the relevant 20 year period, they saw no evidence of any such regular activity on the Land, such as worn areas on the Land where children may have played or any other resulting wear and tear.

6.34 From all such evidence, it seems to me that some children's play has taken place on the Land by inhabitants of the neighbourhood, but it has been relatively limited. Indeed, from my site visit and from the evidence over the condition of the Land, I would not expect it to have been a particularly attractive site for such purposes. It was open land that was easily accessible, but it was steeply sloping, significantly rutted to the extent that it was not easy to walk upon let alone play games, and I note the evidence from a number of witnesses that it was boggy and often became too wet to walk on.

6.35 Other activities were referred to as having taken place on the Land, such as nature watching, kite flying and picnicking. All such activities are capable of

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<sup>109</sup> By reference to AP1.

amounting to lawful sports and pastimes and I accept from the evidence that they have occurred on the Land from time to time. However, the evidence did not indicate that any of such activities occurred with any particularly regularity during the relevant 20 year period by inhabitants of the neighbourhood.

6.36 Therefore, taking into account the evidence of all the various activities that have taken place on the Land throughout the relevant 20 year period by inhabitants of the neighbourhood, and discounting those elements that are more akin to the exercise of a right of way, and considering the Objectors' evidence of a lack of use of the Land on many specific occasions when witnesses have attended the Land to take photographs or otherwise, I find that the use of the Land for lawful sports and pastimes has been sporadic and occasional during the relevant 20 year period, and insufficient on the balance of probabilities to demonstrate to a reasonable landowner that recreational rights were being asserted over the Land. Consequently, I find that that element of the statutory criteria has not been established.

#### **Use by a Significant Number of the Inhabitants of any Locality or of any Neighbourhood within a Locality**

6.37 In order to determine this further element of the statutory criteria, it is firstly necessary to identify the appropriate locality or, alternatively, neighbourhood within a locality for the purposes of the legislation. The Applicant confirmed at the Inquiry that the neighbourhood being relied upon was that identified on Plan (B) submitted with the Application where the neighbourhood was outlined in green. The issue then arising is whether that area amounts to a qualifying neighbourhood within the meaning of the 2006 Act. In that regard, applying the legal principles set out above, the fundamental issue to be determined is whether that identified area has a sufficient degree of cohesiveness to amount to a "*neighbourhood*", which cannot merely be an area drawn on a map.

6.38 The area identified does not have a particular known name, although that is not a pre-requisite to it being a qualifying neighbourhood. Its only facilities are a parade of shops, and they do not merely serve the identified neighbourhood. It has no school, doctor's surgery, church, public house or leisure facilities. Further, it is not an individual housing estate. Instead, it comprises a mix of house types and designs.

6.39 I acknowledge that there are elements of cohesiveness within the identified neighbourhood. However, the evidence failed to indicate that any such cohesiveness applied to the entire and specific area identified which, in my view, is the crucial issue. Hence, the Applicant referred to the community shops in Fernside Avenue but, as accepted by him, they do not specifically serve the identified neighbourhood. The Wishing Tree Residents' Association covers the neighbourhood but also an additional area. He stated that there have been Neighbourhood Watch Schemes in various parts of the neighbourhood, but not a Scheme covering the specific area claimed. There are coffee clubs in the Fern Road / Gillsman's Park area, but none were referred to that covered the wider neighbourhood identified. The residents of Marlborough Close organise social events, but the evidence was that they were limited to that Close rather than to the identified wider neighbourhood. I accept that there is a community spirit within individual parts of the neighbourhood, but I heard and have read no evidence that such community spirit applies to the entirety of the specific area identified as the neighbourhood rather than to smaller parts within it. Further, from my unaccompanied

site visit I undertook round the claimed neighbourhood, there was nothing to suggest that the particular identified area was itself a cohesive community.

6.40 The Applicant explained that the neighbourhood was bounded by main roads and the railway. I accept that evidence. However, it remains necessary for the requisite degree of cohesiveness to be established. It appears to me from the evidence that the Applicant identified the neighbourhood by reference to the area over which residents used the Land, and then drew that line on a plan with reference to specific features on the ground, namely main roads and the railway line, rather than by identifying a specific cohesive neighbourhood. Indeed, that is confirmed by the Applicant's evidence that the neighbourhood was only identified after the questionnaires had been collated.

6.41 Therefore, from the available evidence, I find that it has not been established on the balance of probabilities that the claimed neighbourhood is a qualifying neighbourhood within the meaning of section 15(2) of the 2006 Act.

### **Use as of Right**

6.42 Turning to whether the qualifying use of the Land was "*as of right*", there was no suggestion that any of the qualifying use was by stealth, by force or with permission. On the contrary, the Objectors' contention was that the use had not in fact occurred. The evidence established that the qualifying use was carried out openly, and there was unhindered open access available to the Land throughout the relevant 20 year period. None of the witnesses had their use of the Land challenged nor is there any evidence that any signs or barriers were erected on the Land seeking to prohibit its use during that period. Further, there is no evidence of any of the users of the Land being given express or implied permission to use the Land. Thus, I find that the qualifying use was *nec clam, nec vi* and *nec precario*.

### **Continuation of Use**

6.43 The final issue is whether the qualifying use continued up until the date of the Application. There was no dispute by the Parties that the Land was fenced in May 2009 and has continued to be fenced thereafter, but that open access to the Land remained until that date. The evidence in support of the Application establishes that the qualifying use continued up until that date. I accept that evidence and find that that particular element of the statutory criteria has been satisfied.

## **7. CONCLUSIONS AND RECOMMENDATION**

7.1 My overall conclusions are therefore as follows:-

- 7.1.1 That the Application Land comprises land that is capable of registration as a town or village green in principle;
- 7.1.2 That the relevant 20 year period is 23 January 1989 until 23 January 2009;
- 7.1.3 That the Application Land has not been used for lawful sports and pastimes throughout the relevant 20 year period to a sufficient extent and continuity to have created a town or village green;
- 7.1.4 That the use of the Application Land for lawful sports and pastimes has not been carried out by a significant number of the inhabitants of any

qualifying locality or neighbourhood within a locality throughout the relevant 20 year period;

7.1.5 That the use of the Application Land for lawful sports and pastimes has been as of right throughout the relevant 20 year periods;  
and

7.1.6 That the use of the Application Land for lawful sports and pastimes continued until the date of the Application.

7.2 In view of those conclusions, it is my recommendation that the Registration Authority should reject the Application and should not add the Application Land to its register of town and village greens on the specific grounds that:-

7.2.1 The Applicant has failed to establish that the Application Land has been used for lawful sports and pastimes to a sufficient extent and continuity throughout the relevant 20 year period to have created a town or village green ; and

7.2.2 The Applicant has failed to establish that the use of the Application Land has been by a significant number of the inhabitants of any qualifying locality or neighbourhood within a locality throughout the relevant 20 year period.

## **8. ACKNOWLEDGEMENTS**

8.1 Finally, I would like to thank the Applicant and the Objectors for providing all the documentation to me in advance of the Inquiry and for the very helpful manner in which the respective cases were presented to the Inquiry. I would also like to thank all the witnesses who attended the Inquiry as they each gave their evidence in a clear, succinct and frank manner. I would further like to express my gratitude to the representative from the Registration Authority for his significant administrative assistance prior to and during the Inquiry.

8.2 I am sure that the Registration Authority will ensure that all Parties are provided with a copy of this Report, and that it will then take time to consider all the contents of this Report prior to proceeding to reach its decision.

**RUTH A. STOCKLEY**

12 August 2012

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